91-1278

NO. (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE,

Petitioner,
vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE ELLVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FROM A JUDGMENT FROM THE SUPREME COURT OF FLORIDA

DR. MARK FELDMAN, PRO SE,

15529 Bull Run Road
Miami Lakes, Florida 33014
(305) 557-8600

PETITIONER IN PRO SE

QUESTION PRESENTED

DOES THE 14TH AMENDMENT RIGHT TO DUE PROCESS PERMIT A STATE TO GRANT TORT IMMUNITY TO A HOSPITAL PEER REVIEW PROCEDURE WHEN SUCH PROCEDURE DOES ITSELF VIOLATE RUDIMENTARY DUE PROCESS BY DENYING THE DEFAMED PHYSICIAN THE RIGHT TO BE PRESENT AND HEARD AND DOES DENY AND DEPRIVE HIM OF A VAULABLE PROPERTY RIGHT?

LIST OF PARTIES TO PROCEEDING BELOW

Petitioner, Pro Se certifies that only the following were parties to the proceedings below:

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.

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QUESTION PRESENTED

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NO._____

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OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE

PETITIONER,

VS

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D.,PA.,JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A., MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D. P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., AND ORTHOPEDIC ASSOCIATES, P.A.

RESPONDENTS.

PETITIONER, DR. MARK FELDMAN, PRO SE, respectfully prays that a Writ of Certiorari be issued to review the judgment and Opinion of the Supreme Court of Florida filed in this proceeding on Nov. 5, 1991.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process and Access to the Courts provisions of the 14th AMENDMENT of the United States Constitution and the Constitution of Florida, Article I, section 9, the Due Process Clause, and Article I section 21, the Access to the Courts Clause.

PRIOR DECISIONS OF THIS COURT INVOLVED

The most recent decision of this Court effecting this case is SUMMIT HEALTH, LTD. v. PINHAS, 111 S.Ct. 1842(1991). The PINHAS Court held that an individual doctor may bring a Sherman Act claim when fraudulent peer review hearings are used to hide anticompetitive activities by hospital boards and individual staff members.

TRAMMEL V. UNITED STATES 445 U.S.40, protected access to the Courts and COUCH V. UNITED STATES 409 U.S. 322 protected the accused against an inability to use protected evidence necessary to assert a claim.

BØDDIE V. CONNECTICUT, 401 U.S. 371 requires a meaningful opportunity to be heard. As this petition will show, such was not the case in this lawsuit.

OPINIONS AND ORDERS BELOW

APPENDIX A:

ORDER OF SUPREME COURT OF FLORIDA OF 11/5/91 WHICH DENIED PETITIONER'S PETITION FOR CERT.

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JURISDICTION OF THE SUPREME COURT

The Opinion of the Florida Supreme Court was entered on November 5, 1991.

The United States Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). This Petition for Writ of Certiorari is filed within 90 days of the entry of the Opinion of the Florida Supreme Court. See, 28 U.S.C. Section 2101(c).

STATEMENT OF THE CASE

FACTUAL STATEMENT

Petitioner, Dr. Mark Feldman, Pro Se is a Podiatrist. Podiatry is the Medical specialty, whose practitioners are licensed in all 50 States, that treat diseases and deformities of the foot, ankle and leg by

medical and surgical means. Podiatrists are defined as Physicians under the Medicare statute. Podiatrists are analogous to Oral Surgeons, who although not recipients of an M.D. degree, render medical and surgical care and hold the same medical drug prescribing privileges as an M.D. or D.O. (Doctor of Osteopathy). Thus, Oral Surgeons are Dentists who specialize in surgery.

Podiatry Schools are separate and apart from Medical Schools as are Dental Schools. In all Colleges of Podiatric Medicine throughout the United States students are taught by all specalities of medicine including orthopedic surgeons.

Podiatric education requires 4 years premedical education with the same pre-med requirements as any medical school. Another 4 years at a college of Podiatric Medicine and post graduate training of 1-3 years of

surgical residency training in an M.D. or D.O. hospital in the United States. Both as undergraduates and post graduates, podiatrists are taught by orthopedic surgeons.

It is the orthopedic surgeon with whom the podiatrist competes upon graduation from residency training. This medical turf war is vitrolic at best in most hospitals. This is because both specialists treat the foot, ankle and lower leg in mostly the same way. Their patient populations are the same, from infancy through geriatrics. Most hospitals allow the orthopedic surgeon to control the hospital privilege admission availibility, as well as the procedures a podiatrist are permitted to perform once admitted to the staff, if ever. This includes whether or not a podiatrist has access to the hospital emergency room call rotation to obtain new patients. This is the tradi//tional method a new practitioner begins

to build his practice. In most hospitals throughout the United States, orthopedic surgeons are successful in barring podiatrists from both staff privileges and emergency room call rotation.

Petitioner returned to his native south Florida in 1973 and began to apply for surgical privileges at every hospital within a 50 mile radius of his office. It was readily apparant there existed an orthopedic blockade of the hospitals and emrergency rooms.

Parkway General Hospital's (PGH), Board of Trustees in 1975, over the vehement and vitrolic objections of the herein defendant orthopedic surgeons granted plaintiff / petitioner surgical privileges giving as their reason that credentials and training rather than competition were the requirements for privileges. Thus, this prestigious 400 bed institution became one of

the few institutions who would grant petitioner privileges because of the objections of the orthopedic surgeons.

Their economic power over the hospitals due to the admission of thousands of patients per year by the orthopedic staff members was very seldom challanged by any Board of Trustees.

The orthopedic blockade of more than 25 hospitals in the South Florida area led to petitioner filing, pro se, FELDMAN V. JACKSON MEMORIAL HOSPITAL, et al, in 1979. See FELDMAN V. JACKSON MEMORIAL HOSPITAL, 509 F.Supp 518, 571 F. Supp. 1000 (S.D. FLA 1983), aff'd 752 F. 2d 647 (11th Cir. 1985), cert. denied 472 U.S. 1029(1985).

Feldman vs Jackson Memorial had 17 hospitals and almost 100 orthopedic surgeon defendants. The 6 week jury trial, was tried by petitioner, here, pro se, and resulted in a

directed verdict for all defendants, rendered at the close of plaintiff's case.

Dr. Feldman missed the 30 day appeal deadline to the 11th Circuit because of misplacement of the Final Judgment. He Moved the District Judge for an Order under FRCP 66 to allow him to appeal. Judge Kehoe denied the request; it mattered not that the entire docket sheet of the Federal Court Clerk had mysteriously disappeared. Dr. Feldman's subsequent appeal of the denial by the District Court to enter another Final Judgment,(which would have allowed plaintiff to appeal the directed verdict) to the 11th Circuit and the United States Supreme Court fell on deaf ears.

One may be certain that respondents here will not inform this Court, as they have done no other, that the affirmances were only to deny the plaintiff an opportunity to appeal

the District Court decision.

The case now comes to this Court a second time because prior to the 6 week trial, the District Court dismissed all pendant State Claims. In the Federal antitrust case that is reported at 509 F.Supp 815., and at 571 F. Supp. 1000, no State claims are dealt with.

During the discovery proceedings for the Federal antitrust trial, the Federal District Judge ordered Parkway hospital(not a defendant in the Federal Case) and the 17 defendant hospitals to produce all records in Dr. Feldmans file. He learned of the secret activities of defendants/respondents here and filed the suit that is in APPENDIX E.

This complaint by Order of the Florida Supreme Court, reported at FELDMAN V. GLUCROFT 522 So.2d 798 (Fla. 1988) and reproduced as appendix D. The defendants in FELDMAN V. GLUCROFT were for the most part some of the

same defendants as in FELDMAN V. JACKSON MEMORIAL ET.AL.

Thus, this case is one where a Federal Court Orders the State Claims to be severed from the complaint involving a Federal Sherman Antitrust Act claim to be tried in State Court, and the Federal Court having ordered the production of the hidden documents, with testimony adduced in the Federal Antitrust trial, establishing the hearings held without notice to the accused petitioner.

After ordering the State claims to be tried in Fla. Circuit Court, plaintiff runs afoul of the Fla. Statute preventing use of evidence the Federal Judge has ordered produced. These documents are the only method by which Dr. Feldman can clear his name, and prove the State claims a Federal Judge ordered tried in State Court.

In a divided opinion the Fla. Supreme

Court granted absolute immmunity to defendants. No cause of action can be proven without the documents and access to testimony which took place without knowledge of the plaintiff and within the 4 walls of the "Peer Review Room". The Supreme Court's decision makes every hospital committee and its hearing room a nisi prius Court. There can be no appeal, nor trial when all access to evidence is barred, and the accused not invited nor allowed to be any part of any of the proceedings against him.

After remand by the Fla. Supreme Court petitioner filed his Second Amended Complaint. Appendix E. Respondents moved the Florida trial Court for an Order requiring petitioner to post a $ 100,000.00 bond as a condition precedent to moving the case further and to dismiss the new complaint

The Fla. Legislature had, in the interim, passed a Statute that prior to a DOCTOR PLAINTIFF instituting ANY LEGAL ACTION OF ANY KIND AGAINST A HOSPITAL COMMITTEE OR MEMBER OF ANY COMMITTEE, the PLAINTIFF must post a bond sufficient to cover the costs of DEFENDANTS attorneys fees and costs.

The Statutes, Fla. Stat., 395.0115(5)(b) and 768.40(6)(b), were stricken by 3 Florida State Circuits within the last 2 years as being unconstitutional. The statutes are presently before the Florida Supreme Court.

The Florida trial Court ordered petitioner to post a $ 100,000.00 bond prior to proceeding with the case remanded from the

Florida Supreme Court. Petitioner sought a Writ of Cert. alleging facial unconstitutionality of such a one way statute as access to the courts were denied only plaintiffs too poor to post bond, of which petitioner here remains one. The Trial Court was asked to dismiss the Amended Complaint by the Third District Court of Appeals so that the Appeals Court could grant cert. (APPENDIX F) The trial Court refused, allowed discovery, granted summary judgment for defendants. Petitioner appealed. Summary Judgment Affirmed, Appendix C, Motion for Re-hearing Denied, Appendix B. Petitioner here sought Writ of Cert. to Fla. Supreme Court,denied, Appendix A. Cert. now being sought in the highest Court of Our Land.

THE FLORIDA STATUTE IN THIS CASE:

The 1983 version of the statue has been modified by section 768.40, Florida Statues (1985). The 1985 statue embodies many of the same elements as the 1983 version with a few note-worthy changes; specifically, subsection 2) of the 1983 statue has been modified and appears in the 1985 version as section 768.40(3)(a):

There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee, or any health care provider furnishing any information, including information concerning the prescribing of substances listed in s. 893.03(2), to such committee, or any person, including any person acting as a witness, incident

reporter to, or investigator for, a medical review committee, for any act or proceeding undertaken or performed within the scope of the functions of any such committee if the committee member or health care provider acts without intentional fraud.

Section 768.40(3)(a), Florida Statutes (1985) (emphasis added). Additionally, subsection (4) of the 1983 statute was subsequently modified and appears as the following subsection (5):

The investigations, proceedings, and records of a committee as described in the *preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the*

subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented

from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

Section 768.40(5), Florida Statues (1965).

THE DECISION AND ACTIONS BELOW PRESENT AN IMPORTANT CONSTITUTIONAL ISSUE WHICH HAS NOT BEEN AND SHOULD BE DECIDED BY THIS COURT

There is nothing more fundamental or basic than one's constitutional right to access to the courts. See WHAT, IN VIEW OF SUPREME COURT, CONSTITUTES THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS, 52 L.Ed 2d 779. Is not the right clearly illusionary if sections of the Florida Constitution, Art. I, sec. 9, Due Process and Article I, sec. 21, Access to the Courts, gives a prospective litigant these fundamental rights to persue a cause of action on the one hand, and the legislature passes statute which eliminates access to the evidence necessary to prove the allegations.

Such a statute makes redress available by no other means because the only evidence available is undiscoverable and inadmissible by statute. And compounding the harm grants absolute immunity to the individuals the cause

of action was intended to reach.

This court has never decided a case involving the diminution of a doctors surgical privileges, done summiarily without any procedural or substantive due process mandated by the United States and a States Constitution and it's statutes which mandate such process. The closest was the recent Pinhas, supra, decision.

Yet, 22 States have "peer review" immunity statutes that grant absolute immunity to hospital peer review committees and their participants in both public and private hospitals. See A COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS, APPENDIX H.

The statutes forbid discovery of documents used against the accused as well as a prohibition against any inquiry as to what was said within the 4 walls of a hearing room or who was present or said what at trial, or pre-trial. The conspiracy of silence to defame or in any other way injure by any other cause of action is complete as there is no other

method of garnering the evidence to prove an aggrieved doctors case.

In petitioner's case, the assult upon his person and property and liberty interest in his profession is more egregious because in

> DEFENDANTS/RESPONDENTS ANSWER TO THE COMPLAINT. THEY ASSERT TRUTH AS A DEFENSE.

yet hide behind the very Florida statute which prohibits ascertainment of the truth.

And how is it possible to obtain the constitutionally protected fundamental right of access to the court when the very statute triggering the immunity is implanted in a case where procedural and substantive due process procedures are mandated and petitioner received none. Such a statute offends TRAMMEL V. UNITED STATES, 445 U.S. 40.

" We hold that when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." COUCH V.

UNITED STATES 409 U.S. 322. MEMORIAL HOSPITAL FOR MCHENRY COUNTY V. SHADUR, 664 F.2D 1058 (7TH CIR. 1981), medical review privilege not recognized in an antitrust action.

This case began as a federal antitrust action with the state claims assigned to state court. No statutory privilege should apply. COUCH, supra.

How far betond the setting of crime and punishment the Constitution requires "States to shoulder affirmative obligations to assure...meaningful access to the courts", BOUNDS V SMITH 430 U.S. 817, AT 824, has been a much debated question. If the pronouncement in LOGAN V. ZIMMERMAN BRUSH, 455 U.S. 422, 430N.5 (1982) is to have any meaning, this Court should resolve the issue presented by this petition.

As BODDIE V. CONNECTICUT, 401 U.S. 371, AT 377 ASSERTS, "Where the State's requirements work to deny any meaningful opportunity to be heard," however, due process has been denied. Does not a doctor

once granted a privilege in a hospital who has the privilege stripped away by other doctors without any procedural safeguards mandated by statute and hospital bylaws fit such a deprivation when a State Statute bars access TO THE ONLY EVIDENCE AVAILABLE TO HIM ?

The Florida law allows a committee member to be deposed only to the extent of matters within his own knowledge that took place outside a committee rooms. The futility of such an undertaking is amply recorded in the deposition taken for trial of Dr. Robert Raskin. APPENDIX I.

Petitioner had never known or met Dr. Raskin. Prior to going to Michigan from Miami. petitioner spoke with the Dr. to ascertain what matters within Dr. Raskin's own knowledge would Dr. Raskin be able to testify about.

Dr. Raskin asserted to petitioner that the true motivation behind respondents actions was because petitioner was an economic threat to the respondents. Furthermore. the letters written on Dr. Raskin's stationery were

composed and written by defendants. Further, the inquiry into the procedure was totally controlled by defendants and that when Dr. Raskin told the defendants to talk to me about the procedure the defendants asserted to him that they had done so when in fact they had not. As this Court can see, any and all questions were blocked by the privilege being asserted. The conspiracy of silence remained. Petitioner was and is barred from the only available evidence to prove his case.

The narrow avenue of entry to the courts afforded by the illusion that someone will come forward to break the code of silence among committee members is just that. This Court has not allowed such State statutes to stand. PICKETT V. BROWN, 462 U.S. 1 (1983).

"Nothing opens the door to arbitrary action so effectively as to allow...officials to pick and choose only a few to whom they will apply legislation and thus to escape the

political retribution that might be visited upon them if larger numbers were affected." RAILWAY EXPRESS AGENCY ,INC. V. NEW YORK, 366 U.S. 106 (1949) AT 116.

If it is true that Dr. Feldman had a Fundamental Right; the liberty and property interest in the surgical privileges which were granted to him by the Parkway hospital board of trustees: and if it is true that such rights cannot be arbitarily and capriciously taken away because of intentional elimination of procedural and substantive due process mandated by both state statute and the hospital bylaws: and if it is true that such a fundamental right is controlled by the Fla. State judicial system monopoly, then it must be true that access to the only medthod of evidence available to vindicate any transgression of the right must not be allowed to stand. Anything less than such strict judicial scrunity leaves the doctots so put upon with a "STATES onerous evidentiary rule that the rule deprives ..(Dr. Feldman) of a

meaningful opportunity to be heard". LITTLE V. STREATER 452 U.S.1 (1981)

As the three Justices said in their dissent in FELDMAN, 522 So.2d at 802:

> "I dissent for the reasons set forth in my dissent to HOLLY V. AULD, 450 So.2d 217 (FLA. 1984). Despite the protests to the contrary, it is obvious that the majority decisions here and in HOLLY create an absolute bar to defamation actions based on proceedings before medical review committees and thus conflict with article I, section 21, of the Florida Constitution. Both certified questions should be answered in the affirmative. "

Petitioner asserts that this Court should grant Cert. and find the statutes are unconstitutional.

This petition presents the questions of whether a State Statute which immunizes peer review participants and prohibits any discovery into the peer review proceedings or documents within the review proceedings violates the the Due Process and Access to the Courts sections of both the State of Florida and the United States Constitutions.

In PINHAS, it was proven that the "peer review" hearings that were held were fraudulent. Petitioner here presents a situation in which "peer review" hearings were held and the Petitioner found guilty WITHOUT ANY NOTICE HAVING BEEN GIVEN TO PETITIONER DESPITE BOTH FLORIDA STATUTES AND THE HOSPITAL BYLAWS REQUIRING NOTICE AND AN OPPORTUNITY TO BE HEARD AND TO PRESENT EVIDENCE IN HIS BEHALF.

The proceedings and adjudication of guilt by the orthopedic surgeon defendants

resulted in a dimunition of his surgical privileges at the hospital where he had them, as in PINHAS, and an inability to obtain hospital privileges at multiple institutions petitioner had applied to. This occurred because the results of the fraudulent peer review were disseminated throughout multiple hospitals by defendants, respondents.

As this Court said in MULLANE V. CENTRAL HANOVER BANK & TRUST CO.,, 339 U.S.306, 314(1950).

" An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"

In the case before this court it is uncontroverted that the petitioner received no notice of any hearing nor any opportunity to participate in the peer review process. The defendants defamed him by their declaration and dissemination to other doctors, non-physician committee members, other hospitals and their corporate ownerships throughout the United States, that the plaintiff performed experimental surgery on a child.

It is uncontroverted that the Parkway Hospital by-laws required a hearing process.(APPENDIX E, P.48). It is uncontroverted that the defendants respondents eliminated petitioners privileges to perform the procedure that he did; and that he had privileges to perform the procedure, granted to him by the Board of Trustees of Parkway hospital.

After defendants removed plaintiffs privilege to perform the procedure without a hearing, they instituted a bylaw provision that the defendants, would be the only

surgeons allowed to do the procedure. Tthus, if in fact the procedure was experimental, which it was not, see Schoenhaus deposition, APPENDIX G. , the defendants actions allowed the defendants to perform experimental surgery on children.

A fair hearing before an unbiased tribunal is essential to due process. DUFFIELD v. CHARLESTON AREA MEDICAL CENTER, 503 F.2d 512, 517 (4thCir. 1974).In our context this means that a physician is "entitled to have his case judged by fair minded doctors who... (are) able and willing to ...decide the case with 'good faith objectivity.'" KLINGE V. LUTHERAN CHARITIES ASS'N, 523 F.2d 56, 63 (8th Cir. 1975).

Once the state has made access to the court an entitlement or necessity the state may not deprive someone of that access unless the balance of state and private interests favors the government scheme. *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422, 102, S.CT. 1148 (1982).

Justice Jackson writing for the court in *MULLANE v. CENTRAL HANOVER BANK & TRUST, CO.*, 399 U.UF.S. 306, 70 S.CT. 652 (1950) *"Many contravercies have raged about the cryptic abstract words of the due process clause but there can be no doubt that at minimum they require the depravation of life liberty of property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."*

The conclusion is hardly a novel one, the Logan Court continues. The court traditionally has held that the Due Process Clause protects civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.

It is abundantly clear that the Florida Constitution Article I Section 21 creates a fundamental right of access to the courts, yet the statutes here in question preventing the discovery and use of any and all material necessary to prove his case serves as a total blockade to that access to the court, that fundamental right is therefore eliminated.

Certainly Dr. Feldman had a property right to the privileges that were granted to him by the Parkway Hospital Board Of Trustees. ***SHAHAWY v HARRISON***, 778 F.2d. 636 (11 THCIR.1985). Dr. Shahawy did not have cardiac catherization privileges. Dr. Feldman had privileges to do the procedure that he did, see Shahawy at Page 644. Dr. Feldman does have a liberty and property interest in the privileges granted to him that were summarily eliminated by the orthopedic surgeon defendant.

IT IS NOTED HERE THAT DR. FELDMAN DID NOT SUE PARKWAY REGIONAL MEDICAL CENTER. This is quite simply because the allegations in the complaint show full well that the hospital was acting only on the basis of the fraudulent

representations by the defendants and Dr. Feldman did not think then, nor does he now, that the hospital should be liable for action of individual defendants that lie to hospital committees where other committee members are nothing more than dupes because of the fraudulent allegations and actions of the defendant orthopedic surgeons.

As Shanawy, at Page 643 points out: *"where termination of staff privileges has successfully invoked due process protection the predicate has been the assistance of an implied contract, or the assistance of such severe injury to the plaintiff that he would be unable to practice in that area. Northeast Georgia RADIOLOGICAL ASSOCIATES v. TIDWELL, 670 F2d 507,510-11 (Fifth Circuit Unit B*

1982)". It is undisputed that the termination of Dr. Feldman's privilege at Fairway to perform the procedure he had privileges to do, was disseminated throughout the hospitals in the South Florida area and that it was the reason he was unable to obtain hospital surgical privileges at any other area hospitals. See in particular letter of Charles Weiss, MD., Chief of Orthopedic Surgeons Mount Sanai Hospitals in the Plaintiffs Complaint Appendix A.

From Logan, at Page 275, 71L.ED.2d 265, at 275,(4) *"Each of our due process cases has recognized, either explicitly or implicitly that because minimum procedural requirements are a matter of federal law they are not diminished by the fact that tne state may have*

specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." "Any other conclusion would allow the state to destroy at will virtually any state created property interest. The Court has considered and rejected such an approach: while the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred without appropriate procedural safe guards. The adequacy of statutory procedures for depravation for a statutorily created property interest must be analyzed in constitutional terms.", VITEK v. JONES, 445 U.S. 480-491, n.6. The deprivation in Dr. Feldmans

case is quite simply the elimination of the availability of all evidence to prove not only a deformation claim but any cause of action that the defendants are clever enough to hide within the four walls of the so-called hearing room.

As Logan goes on to say at Page 276 IC,(b) *"As our decisions have emphasized time and again the due process clause grants the agreed party the opportunity to present his case and have its merits fairly judged. It has become a truism that some form of hearing is required, before the owner is finally deprived of a protective property interest."* To put it as plainly as possible, the state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of

entitlement. It would seem a maxiom therefore, that the State cannot on one hand grant the Plaintiff such as Dr. Feldman the right of access to the courts, to the courts, and on the other, withhold from the Doctor any and all evidence needed to support his claim.

A central question in the Plaintiff's case here is that on what basis was the immunity statue triggered when Dr. Feldman was afforded no procedural or substinative due process as the hospital bylaws and state statue require prior to the implementation of immunity. That is to say immunity is predicated on an individual having both substantive and procedural due process. It is undisputed that Dr. Feldman had neither. Neither the Supreme Court nor

the courts below would answer this question. Does, "a meaningful opportunity to be heard, firmly imbedded in our due process jurisprudence", 401 U.S. 577, Dr. Feldman was eliminated from the outset. *BODDIE v. CONNECTICUT*, 401 U.S. 371.

The **PINHAS**, Court, supra, has applied the discovery privileges in antitrust cases through a long line of hospital and doctor grievance cases. The PINHAS decent suggest that the antitrust laws are not the correct Forum, but state tort laws govern and would have doctors grievances confined to state court tort law systems. Eliminating the availability of evidence that state courts require for civil litigants to proceed clearly eliminates the cause of action before any

complaint is filed. This denial of the constitutional right to access to the courts cannot be eliminated by a states eliminating access to the evidence necessary to prove ones case. See annotation quotes, **WHAT, IN VIEW OF SUPREME COURT, CONSTITUTES THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.** 52 L.LEd.2d779. Such evidentiary barriers were eliminated by this United States Supreme Court in ***HERBERT v. LANDO***, 441U.S.153 decided in 1979. As the Lando Court said, at Page 171 *"spreading false information in and of itself caries no first amendment credentials. There is no constitutional value in false statements of fact"* ***GERTZ v. ROBERT WELCH*** at 340, it is clear that Evidentiary privileges in litigation are not favored. ***ELKINS v.***

UNITED STATES, 364 U.S. 206, 234 (1960) as the court went on to say the President for example does not have an absolute privilege against disclosure material subpoenaed for a judicial proceeding. ***UNITED STATES v. NIXON***, 418 U.S. 683 (1974) As the Nixon Court stated at 710 *"whatever their origins these exemption to the demand for every mans evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth."*

STATUTORY PEER REVIEW IMMUNITY LAWS IN THE UNITED STATES

State peer review immunity laws are in Appendix H, attached to this brief. It was prepared in 1988 by the Medical American Association.

Non-discoverability and confidentiality. The states of Alaska, Arkansas, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Road Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin prohibit the utilization of records of peer review committees making them confidential and non discoverable. These twenty-two states have enacted statues that say that the proceedings and records

of peer review committees typically are confidential and non discoverable.

An exception that is present in the peer review non-discoverability laws of a number of states permits a physician to obtain access to peer review materials when challenging the criterion, suspension, termination or denial of staff privileges. The states containing this exception are, Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, Oregon, Road Island, South Dakota and Washington. These seventeen states permit Doctors injured as Dr. Feldman was access to the records contained in such peer review proceedings when the records of such peer review committees and

proceedings are necessary to prove the allegations in the complaint and it may be done by no other means.

The Court should accept jurisdiction and grant certiorari to resolve the extraordinary dichotomy between the access to evidence among the disparate statues which exists in the states identified above.

As an example of how far the State of Florida has gone to immunize absolutely the participants in the peer review process, the Florida Statue which mandated that prior to filing a civil action against a hospital or members of a peer review committee **PLAINTIFF** must post a bond sufficient to cover the cost of the Defendants attorneys fees and cost must be posted prior to the institution

of such a civil action. The bond requirement provision has been stricken as unconstitutional by three Circuit District Courts Of Appeal In Florida. The issue is currently before the Florida Supreme Court. After the Supreme Court mandate allowed the Plaintiff Dr. Feldman to amend his complaint the statutory bond provision was applied to the Plaintiff and a $100,000 bond order was entered by the trial court. Dr. Feldman appealed the bond provision as being attached to his amended complaint and the issue was never ruled upon by the District Court Of Appeals Of Florida or the Florida Supreme Court.

It is readily apparent that the thousands of doctors practicing in twenty-two States who are set upon by

their competitors, enemies, or tortfeasors in a hospital setting will remain powerless, as they are today, to defend themselves. The nondiscoverability statues grant absolute immunity to any accusers throughout any of twenty peer review committees in a hospital composed of both physicians and non-physicians. This Court should intervene to settle the question of the Constitutionality of these statues when they prohibit access to the courts. Is it possible that the United States Supreme Court will allow these malignant statutes preventing discovery of evidence necessary to prove a Doctors innocence to remain untreated and further metastasize throughout the United States? Petitioner implores this court to grant his

requested Writ of Certiorari tend to decide the issue for this Nation.

THE STATUTE OF LIMITATIONS ISSUE

Defendants below raised the issued of statute limitations as a defense. The statute limitations is governed by ***CASTER v. SAINT MARY'S HOSPITAL***, 835 F.2d 289, (1987). It is not disputed that the plaintiff, petitioner, had no notice of any of the proceedings that destroyed his surgical career. Their accusations were secret, their deliberations were secret; their removal of the privileges of the plaintiff were secret; their dissemination of their actions at Parkway and disseminated to subsequent hospitals namely North Miami General and Mount Sanai Hospital to name but a few were secret. It was only after the discovery of the fraudulent concealment

that plaintiff became aware and he promptly sued them. As in **CASTER**, supra, and the cases cited therein fraudulent concealment tolls the statue of limitations.

THE DEFENDANTS ACTIVITIES UNDER STATE LAW

It has been stated the plaintiff did not sue the hospital because the defendants activities as alleged in the complaint were outside the provisions of the bylaws and when directed to perform in accordance with the bylaws. When defendants continued activities outside the bylaws and their fraudulent representations to the committees that they had acted within in the hospital bylaws may serve to assert by defendants that they acted under color of state law.

Thus the defendants were, according to them, (1) So directed and constrained by state law, Florida Law 768.40(4),FLA.STAT. Florida Law required the defendants to operate through a

committee under bylaws proscribed by the Hospital. (2) That this committee and those that they appeared before in multiple hospitals had the power to make decisions affecting the plaintiffs property, livelihood, and the liberty interest in his reputation.

(3) That because the state law gave the defendants the power to deprive the plaintiff of his property his livelihood and his liberty interest in his reputation, it clothed them with the color of state law and required them to give due process to the plaintiff including notice of the charges against him and the opportunity to be heard.

The defendants thus have asserted the operation of Florida Law 768.40(4)(1977), as construed by the

Florida Courts, totally deprives the plaintiff of his property livelihood and liberty interest in his reputation by cutting off all access to evidence that proves the due process violations.

The clear facts are that defendants activities took place outside the statutes if the allegations in the complaint are, and they must be accepted as true. The immunity protection proscribed by the statue should not apply to these defendants. The evidence should be therefore discoverable. If not, then by defendant assertions they were acting under coloration of State Law and a Section 1983 case should be established.

Unlike the Pinnas Case, petitioner here has alleged that conspirators has perverted the peer review process in hospitals throughout the city. The peer review process at Parkway led to being the gateway to other hospitals in the South Florida market, in the sense being the only way *"or even one of the few ways"* to gain entry., See Pinhas at Section II. (2).

Had petitioner here been afforded ten percent of the procedural protection accorded the Doctor in ***HAYDEN v. BROACY***, 744 F.2d,@ 1343 this petition would not be before this court. From the beginning of the Broacy case at Page 1338 to its very end this court can see in great detail the procedural and substantive due

process protection the doctor received. We deal not with even a modicum of such protection afforded to Doctor Feldman. Indeed the opposite is true. He was kept in the dark by the defendants and they did so deliberately. The witch hunt and subsequent burning destroyed the plaintiffs life and this court should allow the petitioner here to prove it. These defendants should not be able to hide behind a misapplied unconstitutional statutes to protect them from their heinous activities in the wanton and wilful destruction of a competent doctors life solely because the orthopedic defendants hated him.

It simply offends due process to countenance a law which confers as a valuable legal right but then permits that right to be capriciously swept away on the wings of luck and happenstance. If the only way a doctor can prove the allegations in a complaint is contained between the four walls of a committee room so well hidden by the defendants that only testimony of the committee members and its witnesses before it, one of whom does not and was not the accused, the valuable legal right of access to the courts is clearly capriciously swept away on the wings of luck and happenstance. This Court has not allowed such infirmities in the judicial system to occur.

Vital to the concept of procedural due process is the notion that a valuable property interest, such as those conferred by state law, (access to the courts) must not be "arbitrarily undermined." *BOARD OF REGENTS v. ROTH*, 408 U.S.564.(1972)

CONCLUSION

For the reasons herein expressed, petitioner prays this Court will grant the Writ of Certiorari to decide a question never decided by this Court. As has been stated, the issue affects the doctors in 22 States which have statutes prohibiting evidentary discovery in medical and hospital peer review procedures.

Petitioner has no way of knowing or assessing what elements are the dispositive reasons for granting the Writ. Clearly the lives of thousands of good doctors who are denied the opportunity to be heard when accused of misconduct in a hospital setting may be one of them, it may not.

This case exhibits an exhaustive dedication to the search for the truth. Except for a single year from 1983-1984 petitioner has had no formal legal training. He quite simply walked into a law library in 1974, asked the head librarian to teach him how to use a law library, and he has been there ever

since. Being a self taught incipient lawyer for the past 18 years is not how he planned to spend his career after 12 years of pre and medical education. Make no mistake, without procedural direction from supportive barristers the legal achievements, if any, would have never been.

As a 34 year old doctor forbidden to practice his specialty because of hatred from surgical specialists whose bretheren had taught him in the first place, the law was clearly his only avenue of persuit and the courtroom his only forum. There was then as now no ability to retain counsel.

In suitable irony, the Board at the only Miami Medical School University Affiliated Hospital mandated that he be allowed to teach in the Orthopedic Surgical Residency program, over the vitriolic objections of the orthopedic surgical staff. He could teach, which he did from 1975-77, but was not permitted to use the hospital for his own patients to earn a living.

Persuit of the legal issues as a pro se litigant from 1975-1992 has resulted in multiple victories and failures. The victories have seen other doctors, podiatrists as well as non-podiatrists gain full access to the hospital operating rooms and emergency room call rosters in Florida and elsewhere. The failures consigned him as an annuity for the trial and appellate Bar while he seeks to clear his name and see the Court's open to similiarily treated doctors in all specalities of medicine around the United States.

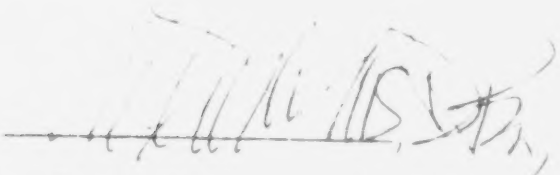
Dr. Feldman's name has endured the disgrace caused by the actions of defendants since 1975, and it continues to this day. No matter that his life has been destroyed by the events culminating from the actions of the defendants. The price paid by petitioner is the destruction of everything he ever expected to hold dear. No doubt that Writs are not granted on such facts.

It remains the exhaustive effort to see the truth asserted within the 4 walls of a

courtroom that brings another pro se litigant to this Court's door. If the inscriptions in the marble that encase this Court mean anything at all, this Court's doors will be open to Petitioner and he will have the meaningful opportunity to be heard he has been seeking.

Dated Jan. 31, 1992

Respectfully submitted,



Dr. Mark Feldman. Pro Se
TTOCSROF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THIS PETITION FOR A WRIT OF CERTIORARI WAS SENT THIS FEB. 3, 1992 TO:

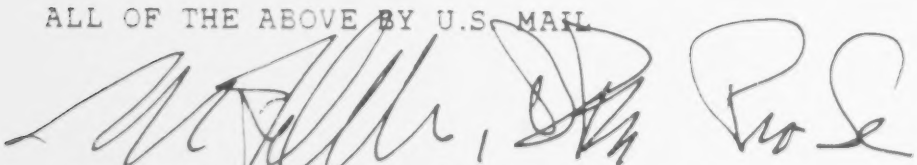
DAN PAUL, ESQ. 701 BRICKELL AVE., 24TH FLOOR, MIAMI, FLA. 33131, 305-347-6819, FAX 372-9928

J.COOPER, ESQ., 150 W. FLAGLER ST., SUITE 2650, MIAMI, FLA. 33130 305-536-3300, FAX 536-3549

HOMER MARLOWE, ESQ., 2[illegible] SW 27 AVE., SUITE 200, MIAMI, FLA., 33133 305-446-0500, FAX 446-3667

THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, TALLAHASSEE, FLORIDA.

ALL OF THE ABOVE BY U.S. MAIL



MARK FELDMAN, PRO SE, 15529 BULL RUN ROAD, MIAMI LAKES, FLA., 33014 305-557-8600 FAX 827-1670

EDITOR'S NOTE

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91-1278

91-1278

NO. (2)

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE,

Petitioner,
vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FROM A JUDGMENT FROM THE SUPREME COURT OF FLORIDA

DR. MARK FELDMAN, PRO SE,

15529 Bull Run Road
Miami Lakes, Florida 33014
(305) 557-8600

PETITIONER IN PRO SE

APPENDIX VOL I

APPENDIX A:

ORDER OF SUPREME COURT OF FLORIDA OF 11/5/91 WHICH DENIED PETITIONER'S PETITION FOR CERT.

APPENDIX B:

ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEALS OF 7/11/91 DENYING MOTION FOR REHEARING

APPENDIX C:

OPINION OF FLORIDA THIRD DISTRICT COURT OF APPEALS OF 5/28/91 AFFIRMING SUMMARY JUDGMENT

APPENDIX D:

OPINION OF FLORIDA SUPREME COURT OF 2/4/88, CITED 522 So.2d 798 (FLA.1988) REMANDING CASE TO TRIAL COURT TO ALLOW AMENDED COMPLAINT

APPENDIX E:

PETITIONER/PLAINTIFF'S SECOND AMENDED COMPLAINT PERSUANT TO OPINION OF THE FLORIDA SUPREME COURT

APPENDIX F:

OPINION OF FLORIDA THIRD DISTRICT COURT OF APPEALS OF 11/28/89, CITED AT 553 So.2d 282 (3DCA 1989) DENYING CERT. ON THE APPLICATION OF BOND POSTING REQUIREMENT

APPENDIX G:

EXCERPTS OF DEPOSITION TAKEN FOR TRIAL OF PETITIONER/PLAINTIFF'S EXPERT DR. SCHOENHAUS 8/8/90

APPENDIX H:

A COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS

APPENDIX I:

DEPOSITION OF PLAINTIFF'S WITNESS DR. ROBERT RASKIN TAKEN FOR TRIAL 7/27/90

APPENDIX A

SUPREME COURT of FLORIDA

TUESDAY, NOVEMBER 5, 1991

MARK FELDMAN, PRO SE

Petitioner,

CASE NO. 78,390

v.

STEPHEN GLUCROFT, ET AL.,

DISTRICT COURT OF APPEAL, 3RD DISTRICT NO. 90-2076

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., MCDONALD, BARKETT, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

BH
CC: Hon. Louis J. Spallone, Clerk
Hon. Marshall Ader, Clerk
Hon. Jack Turner, Judge

Dr. Mark Feldman, Miami Lakes
Dan Paul, Esquire
Frank Burt, Esquire
Irma T. Solares, Esquire

APPENDIX B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1991

JULY 11, 1991

DR. MARK FELDMAN, CASE NO. 90-02076

Appellant (s),

vs.

STEPHEN GLUCROFT, et al., LOWER TRIBUNAL NO. 84-8615

Appellee (s)

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court Of Appeal,
Third District

cc: Dr. Mark Feldman
Homer Marlow
/NB
Dan Paul
Jay Cooper

APPENDIX C

NOT FINAL UNTIL TIME
EXPIRES TO FILE REHEARINGS
MOTION AND, IF FILED,
DISPOSED OF.

IN THE DISTRICT

COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

DR. MARK FELDMAN,

Appellant,

VS. CASE NO. 90-2076

STEPHEN GLUCROFT, M.D., JOEL B. DENNIS, M.D., LLOYD A. MORIBER, M.D., MELVYN G. DRUCKER, M.D., KENNETH HODOR, M.D., ROBERT S. ENNIS, M.D., HUGH UNGER, M.D., and ORTHOPEDIC ASSOCIATES, P.A.,

Appellees.

Opinion filed May 28, 1991.

An Appeal from the Circuit Court for Dade County, Jack Turner, Judge.

Dr. Mark Feldman, in proper person.

Jordan, Schulte & Burchette and Dan Paul and Frank Burt and Irma T. Solares, for appellees.

Before HUBBART, BASKIN and COPE, JJ.

PER CURIAM.

Dr. Mark Feldman appeals from a final summary judgement in favor of defendants We affirm.

The facts of this case are stated in **Feldman v. Glucroft,** 522 So.2d 798, 800 (Fla. 1988), in which the Florida Supreme Court held that section 768.40, Florida Statutes (1983), "allows a defamation action against a committee member or health care provider when the plaintiff can establish extrinsic evidence of malice or fraud." The court directed that the district court of appeal "remand this cause to the trial court with directions that the plaintiff be allowed to file an amended complaint under the principles and restrictions expressed in this opinion." Feldman, 522 So.2d at 800. On remand, Feldman filed an amended complaint realleging the defamation count and alleging additional causes of action arising from the same set of facts.

The trial court granted summary judgment in favor of defendants as to the additional counts. Defendants filed a subsequent motion for summary judgment on the defamation count, contending that Feldman failed to allege extrinsic evidence of malice or fraud. The trial court entered final judgement in favor of defendants. Feldman filed an appeal.

The record supports the trial court's determination that the amend complaint did not allege extrinsic evidence of malice or fraud. The complaint states that " (t)he fact that the Defendants... opposed granting medical staff privileges to the Plaintiff without good cause arbitrarily and capriciously in the first instance and later curtailed the Plaintiff's privilege to perform the celastic implant

procedure arbitrarily and capriciously and without good cause is extrinsic evidence of malice toward the Plaintiff . . . " (Emphasis supplied).

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However, those allegations established defendants' opposition to and curtailment of Feldman's hospital privileges only in privileged peer review committee proceedings where "(t)he shield of confidentiality protects what is presented or spoken to the committee at its meetings." Feldman, 522 So.2d at 801. Feldman failed to allege the existence of the requisite extrinsic evidence to overcome the statutory privilege afforded defendants. 768.40, Fla. Stat. (1983).

The documents attached to the amend complaint were either privileged committee documents or did not demonstrate malice or fraud. Defendants were therefore entitled to judgment as a matter of law.

As to the additional counts, the trial court correctly found that such counts were outside the supreme court mandate. The supreme court determined that "the summary judgment should be vacated to allow the plaintiff an opportunity to allege extrinsic malice or fraud," and that the amend complaint may be filed "under the principles and restrictions expressed in this opinion." Feldman, 522 So.2d at 801. The amended complaint did not adhere to the supreme court mandate. Thus, the trial court did not err in entering summary judgment

on the additional counts.

Appellant's remaining points lack merit.

Affirmed.

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APPENDIX D

798 Mark H. Feldman, Petitioner

v.

Stephen GLUCROFT, M.D., et al., Respondents.

No. 68920.

Supreme Court of Florida

Feb. 4, 1988.

Rehearing Denied April 28, 1988.

Podiatrist brought defamation action against members of medical review committee. The Circuit Court, Dade County, Jack M. Turner, J., granted defendants' motion for summary judgment, podiatrist appealed. The District Court of Appeal, Schwartz, C.J., 488 So.2d 574, affirmed, and certified questions to Supreme Court. The Supreme Court, Overton, J., held that statute protecting

records and proceedings of medical review committee from discovery and use in civil action arising out of matters reviewed by the committee does not totally abolish defamation action arising from information furnished to medical review committee; statute allows defamation action against committee member or health care provider when plaintiff can establish extrinsic evidence of malice or fraud.

Remanded with directions.

Grimes, J., filed special concurring opinion.

Shaw, J., dissented with opinion.

Ehrlich and Barkett, JJ., dissented.

Libel And Slander 34, 51(1)

Statute protecting records and proceedings of medical review committee

from discovery and use in civil action arising out of matters reviewed by the committee does not totally abolish defamation action arising from information furnished to medical review committee; statute allows defamation action against committee member or health care provider when plaintiff can establish extrinsic evidence of malice or fraud. West's F.S.A. 766.40(2, 4).

Mark H. Feldman, D.P.M., in pro. per.

Dan Paul, Franklin G. Burt and Victoria L. Baden of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, Miami, for respondents.

Charles C. Powers of Charles-C. Powers, P.A., West Palm Beach, amicus

curiae for the Academy of Florida Trial Lawyers.

Emil C. Marquardt, Jr. of McMullen, Everett, Logan, Marquardt & Cline, P.A., Clearwater, amicus curiae for The Florida Hosp. Ass'n and The Florida Medial Ass'n.

Henry H. Raattama, Jr. and Edwart T. O'Donnell of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, amicus curiae for South Florida Hosp. Ass'n.

Joseph W. Little, Gainesville, amicus curriae.

OVERTON, Justice

This is a petition to review **FELDMAN** v. **GLUCROFT**, 488 So.2d 574 (Fla. 3d DCA 1986), in which the Third District Court of Appeal held that a defamation action could not be maintained against medical review committee members and the hospital

they serve due to the privilege established by section 768.40(4), Florida Statutes (1983). The district court certified the following questions to be of great public importance:

1. Does section 768.40(4) totally abolish a defamation claim arising in proceedings before medical review committees?

2. If so, is section 768.40(4) invalid as in conflict with Article I, section 21, Florida Constitution?

Id. at 575. We have jurisdiction, article V, section 3(b)(4), Florida Constitution. We answer the first question with a qualified "no" and find a defamation claim arising under the 1983 statute is not totally abolished since a plaintiff

may proceed with such an action if he or she can establish extrinsic evidence of malice or fraud. The second question is rendered moot since we find no total abolishment of a defamation claim. We approved this legislation, and its legislatively determined need, in our recent decision in *HOLLY v. AULD*, 450 So.2d 217 (Fla. 1984). For the reasons expressed, we approve in part and quash in part the district court's decision.

The relevant portion of the record contains the following facts. Dr. Feldman is a licensed podiatrist practicing in Dade County, Florida, and had surgical privileges at Parkway General Hospital. As part of his practice, Dr. Feldman performed an arthroereisis procedure on a child to

repair a "flatfoot" deformity. In 1979, Dr. Feldman filed a civil action in United States District Court, unrelated to the case at bar, asserting federal antitrust and constitutional claims against eighty-five defendants. During the federal antitrust action, Dr. Feldman discovered what he considered a defamation of him by a medical review committee in its determination not to allow the above-described surgical procedure by any podiatrist at Parkway General Hospital.

On March 8, 1984, Dr. Feldman filed a three-count pro se complaint that sets forth the basis of this proceeding. Counts I and II alleged that respondents libeled, slandered, defamed, and/or placed him in a false light by stating

that he had performed an experimental surgical procedure on a child. Feldman also alleged respondents violated his due process and equal protection rights under the United States and Florida constitutions by revoking his privilege to perform the procedure at Parkway General. In particular, Dr. Feldman alleged that the respondents initiated the internal review of the surgical procedure and determined the procedure was experimental without his knowledge. He asserted he was not given notice of the internal review or permitted to explain or defend the procedure, in violation of Parkway Hospital bylaws. Dr. Feldman also alleged respondents used the committee report at Parkway to deny

him privileges at North Miami General Hospital.

The trial court refused to compel production of the notes and records of all orthopedic staff committee meetings at Parkway General concerning Dr. Feldman and the surgical procedure. The trial court ruled that such matters were privileged under section 768.40(4), Florida Statues (1983), and rejected Dr. Feldman's argument that 768.40 is unconstitutional. The trial court rendered final summary judgment in favor of respondents on all counts. The district court affirmed the trial court on the ground that no such action may be maintained under 768.40(4), as interpreted by this Court in *HOLLY* v.

AULD. 450 So.2d 217 (Fla.1984). The district court stated:

> [W]e think it clear from the *Holly* case, particularly when read in the light of Justice Shaw's dissenting opinion-which does directly treat the point-that the language of the statute creates an absolute privilege and means that any existing defamation action has been totally abolished.

FELDMAN v. GLUCROFT, 468 So.2d at 575.

Question I: Abolition of a Defamation Claim by Section 768.40(4)

We disagree with the Third District's interpretation that section 768.40(4), Florida Statutes (1983), totally abolishes a defamation action arising from information furnished to a medical review committee. We find the

1983 statute, rather than totally abolishing the cause of action, adds an additional restrictive element to this cause of action. The relevant portion of section 766.40, Florida Statutes (1983), provides:

> (2) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee... *if the committee member or health care provider acts without malice or fraud.* The immunity provided to members of a duly appointed medical review committee shall apply only to actions by providers of health services, and in no way shall this section render any

> medical review committee immune from any action in tort or contract brought by a patient or his successors or assigns.
>
> ...
>
> (4) The proceedings and records of committees as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee...
>
> (Emphasis added.)*

Considering these provisions, it is evident that the statute allows a defamation action against a committee member or health care provider when the

plaintiff can establish extrinsic evidence of malice or fraud. It is clear that subsection (4) shields the contents of medical review proceedings from discovery. that requirement does not, however, restrict obtaining evidence of malice or fraud from testimony or documents which are not part of the record of those proceedings.

We considered the intent and purpose of this legislation in *Holly* and concluded that the legislature had a clear public need and justifiable basis for creating this limited restriction in the area of health care. We stated:

In an effort to control the escalating cost of health care in the state, the legislature deemed it wise to encourage a degree of self-regulation by

the medical profession through peer review and evaluation. The legislature aiso recognized that meaningful peer review would not be possible without a limited guarantee of

*The 1983 version of the statue has been modified by section 768.40, Florida Statutes (1985). The 1985 statute embodies many of the same elements as the 1983 version with a few note-worthy changes; specifically, subsection (2) of the 1983 statute has been modified and appears in the 1985 version as section 768.40(3)(a):

> There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee, or any health care provider

furnishing any information, including information concerning the prescribing of substances listed in s. 893.03(2), to such committee, or any person, including any person acting as a witness, incident reporter to, or investigator for, a medical review committee, for any act or proceeding undertaken or performed within the scope of the functions of any such committee if the committee member or health care provider acts without intentional fraud.

Section 768.40(3)(a), Florida Statues (1985) (empnasis added). Additionally, subsection (4) of tne 1983 statue was subsequently modified and appears as the following subsection (5):

The investigations, proceedings, and records of a committee as described in

the confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues.

...A doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justifiable, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against colleague in a malpractice suit. The discovery privilege of subsection (4) was clearly designed to provide that degree of confidentiality necessary for the full, frank medical peer evaluation which the legislature sought to encourage. Neither the language of the statute, nor the legislative intent discernable therefrom,

admits of an interpretation which would limit the discovery privilege to medical malpractice actions and would preclude its application to defamation actions.

Inevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful, or even essential, to their causes. We must assume that the legislature balanced this potential detriment against the potential for health.

> preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such

committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who

> testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

Section 768.40(5), Florida Statues (1985).

> care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight.

450 So2d at 219-20 (footnote omitted)

We find the language of subsection (2) allows a defamation action when it can be established that the committee

member acts maliciously or fraudulently. We agree with the Third District Court of Appeal's interpretation of HOLLY expressed in PARKWAY GENERAL HOSPITAL, INC. v. ALLINSON, 455 So.2d 123 (Fla. 3d DCA 1984). In construing HOLLY, the Parkway court held the subject records and statements of the committee were absolutely privileged and immune from discovery. The court cautioned that its determination does not preclude a plaintiff from presenting extrinsic evidence of malice or fraud from sources such as "documents or records otherwise available from original sources [which] are not immune from discovery," nor does the statute prevent anyone who participates in a review committee proceeding from testifying separately as

to matters within his or her knowledge. Id. at 126. The shield of confidentiality protects what is presented or spoken to the committee at its meetings. If that information is available from other than committee sources, then it may be used in a defamation action, which must be based on malice or fraud under the 1983 statute and intentional fraud under the present statute. Under these circumstances, the cause of action has not been totally abolished. This type of immunity is not unusual. There is an absolute, rather than a qualified, immunity from defamation actions in all judicial and legislative hearings; moreover, this type of immunity applies in many other professional, licensing, and administrative proceedings. Seem e,g,m

McNAYR v. KELLY, 185 So.2d 428, 431 (Fla. 1966) (statements of public officials in their official capacity); ROBERTSON v. INDUSTRIAL INSURANCE CO., 75 So.2d 198 (Fla.1954)(statements made in license revocation proceedings before the Insurance Commissioner); LLOYD v. HINES, 474 So.2d 376 (Fla. 1st. DCA 1985) (statements of state law enforcement agent as witness in criminal trial); BELL v. GELLERT, 469 So.2d 141 (Fla. 3d DCA 1985) (statements made in labor grievance complaint which were relevant to that complaint); FAITH v. WAKEMAN, 385 So.2d2 (Fla. 4th DCA 1980)(compelled testimony before a legislative committee); STONE v. ROSEN, 348 So.2d 387 (Fla. 3d DCA 1977) (absolute privilege of citizen to make

complaint against Florida Bar member); **SEIDEL v. HILL**, 264 So.2d. 81 (Fla. 1st DCA 1972) (statements introduced in quasi-judicial proceedings such as worker's compensation proceedings); **GREEN v. HOIRIIS**, 103 So.2d 226 (Fla. 3d DCA 1958)) (statements made in connection with unemployment compensation proceedings). The justification for the immunity in these circumstances i that the necessary information could not otherwise be obtained without this protection. We accept the legislative determination that, without this type of qualified immunity, a viable health care peer review process would be difficult, if not impossible, to maintain. We concluded that section 768.40, Florida Statutes (1983), does not totally abolish

the defamation cause of action. As a result of this holding, we need to address the second question.

In this instant case, we find the trial court properly denied the discovery request, but find that the summary judgment should be vacated to allow the plaintiff an opportunity to allege extrinsic malice or fraud. Accordingly, the district court of appeal is directed to remand this cause to the trial court with directions that the plaintiff be allowed to file an amended complaint under the principles and restrictions expressed in this opinion.

It is ordered.

McDONALD, C.J. and KOGAN, J., concur.

GRIMES, J., concurs specially with an opinion.

SHAW, J., dissents with an opinion.

EHRLICH and BARKETT, JJ., dissent.

GRIMES, Justice, specially concurring.

It may be that there will be few circumstances in which a complaining party can successfully prosecute a lawsuit in the face of the limitations of the statue. However, I concur in the opinion, even if the statue has the practical effect of barring defamation actions against medical review committees.

In the first place, I am not at all certain that the "access to courts" provision of the Florida Constitution, article, section 21, is being abolished.

At the most, the legislature simply decided to confer an absolute privilege against liability upon certain persons under certain circumstances. The majority opinion refers to many other examples of absolute privilege which have been sustained in Florida.

Even if the statute is construed as abolishing a cause of action, it can be sustained under **KLUGER v. WHITE**, 281 So.2d 1 (Fla. 1973), as the result of a legislative determination of overwhelming public necessity. The limitation upon discovery and introduction into evidence of the proceedings and records of medical review committees was first enacted in chapter 73-50, Laws of Florida. The preamble to that statue reads as follows:

WHEREAS, the Legislature is deeply concerned over the rising costs of health insurance which are directly related to the costs of hospital and medical services and increasing problems in the area of medical malpractice insurance; and

WHEREAS, the various health services, professional societies and associations in the State of Florida are promulgating programs and establishing committees for the purpose of reviewing standards of care, utilization and expense in the rendering of health services in an effort to deter or eliminate some of the causes of the increased claims and costs of providing health services and to provide a

statistical base for further analysis, study and recommendations, and

WHEREAS, the Legislature recognizes the advisability of immunity for peer review committees so that the medical profession can explore over-utilization of medical services, improper charging for medical services, and acts of malpractice in order that it can have better control over its members and experience rate its physicians for malpractice coverage.

Ch. 73-50, Laws of Fla. Hence, it is evident that in order to improve the quality of medical services, the legislature has perceived an overwhelming need that medical review committees

function without fear of retaliation. As this Court noted in HOLLY v. AULD, 450 So.2d 217, 220 (Fla.1984):

> Inevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful or even essential, to their causes. We must assume that the legislature balanced this potential detriment against the potential for health care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight. It is precisely this sort of policy judgment which is exclusively the province of the legislature rather than the courts.

SHAW, Justice, dissenting.

I dissent for the reasons set forth in my dissent to **HOLLY v. AULD**, 450 So.2d 217 (Fla.1984). Despite the protests to the contrary, it is obvious that the majority decisions here and in the **HOLLY** create an absolute bar to defamation actions based on proceedings before medical review committees and thus conflict with article I, section 21, of the Florida Constitution. Both certified questions should be answered in the affirmative.

APPENDIX E

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE NUMBER: 84-08615 Judge Turner

DR. MARK FELDMAN, PRO SE,

Plaintiff,

vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOK, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

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PLAINTIFF'S
SECOND AMENDED COMPLAINT

COMES NOW the plaintiff, DR. MARK FELDMAN, Pro Se, sues Defendants and states:

1. This is an action for damages in excess of Five Thousand Dollars ($5.000.00).

2. Plaintiff, DR. MARK FELDMAN, is and was at all times material herein a resident of Dade County, Florida.

3. At all times material herein, DR. MARK FELDMAN was fully trained and licensed by the State of Florida to practice as a podiatrist anywhere within the jurisdiction of the State of Florida.

4. At all times material herein, STEPHEN GLUCROFT, M.D. was licensed by the State of Florida to practice as a medical doctor and practiced in the State of Florida as an orthopedic surgeon and further at all times material herein he was an employee or agent of STEPHEN GLUCROFT, M.D., P.A. acting in the course and scope of said employment.

5. At all times material herein, JOEL DENNIS, M.D. was licensed by the

State of Florida to practice as a medical doctor and practiced in the State of Florida as an orthopedic surgeon and further at all times material herein he was an employee or agent of JOEL DENNIS, M.D., P.A. acting in the course and scope of said employment.

6. At all times material herein, LLOYD MORIBER, M.D. was licensed by the State of Florida to practice as a medical doctor and practiced in the State of Florida as an orthopedic surgeon and futher at all times material herein he was an employee or agent of LLOYD MORIBER, M.D., P.A. acting in the course and scope of said employment.

7. At all times material herein, MELVYN DRUCKER, M.D. was licensed by the State of Florida to practice as a medical doctor and practiced in the

State of Florida as an orthopedic surgeon and further at all times material herein he was an employee or agent of MELVYN DRUCKER, M.D., P.A. acting in the course and scope of said employment.

8. At all times material herein, KENNETH HODOR, M.D. was licensed by the State of Florida to practice as a medical doctor and practiced in the State of Florida as an orthopedic surgeon and further at all times material herein he was an employee or agent of KENNETH HODOR, M.D., P.A. acting in the course and scope of said employment.

9. At all times material herein, ROBERT S. ENNIS, M.D. was licensed by the State of Florida to practice as a medical doctor and practiced in the State of Florida as an orthopedic surgeon and further at all times

material herein he was an employee or agent of ROBERT S. ENNIS, M.D., P.A. acting in the course and scope of said employment.

10. At all times material herein, HUGH UNGER, M.D. was licensed by the State of Florida to practice as a medical doctor and practiced in the State of Florida as an orthopedic surgeon and further at all times material herein he was an emoloyee or agent of HUGH UNGER, M.D., P.A. acting in the course and scope of said employment.

11. At all times material herein, Defendants, STEPHEN GLUCROFT, M.D., Individually and STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., Individually and JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., Individually, and LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D.,

Individually, and MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., Individually, and KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., Individually, and ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., Individually, and HUGH UNGER, M.D., P.A. were employed by or were agents of ORTHOPEDIC ASSOCIATES, P.A. and were acting in the course and scope of their employment or agency for said P.A., and through ORTHOPEDIC ASSOCIATES, P.A. they acted in concert and executed great economic influence.

12. That podiatry is that branch of medical science that concerns itself solely with treatments of the foot and ankle including surgery, and the practice of podiatry is authorized in the State of Florida pursuant to Florida Statutes Chapter 461 et seq.

13. That the practice of medicine is regulated by the State of Florida pursuant to Florida Statutes 458 et seq. and the practice of orthopedic surgery is a specialty within the general practice of medicine which specialty concerns itself with treatment of maladies involving the bones, joints, and muscles including surgery and this includes treatment of the foot and ankle such that it can be said that in this area orthopedic surgery and podiatry overlap.

COUNT I

14. All introductory paragraphs are realleged and incorporated herein by this reference.

15. The individual Defendant physicians were at all times material herein members of the medical staff of Parkway General Hospital and North

Miami General Hospital, both of which are general hospitals located in North Miami, Florida.

16. Each of the individual Defendants held medical staff privileges specializing in the area of orthopedic surgery at the said hospitals, Parkway General Hospital and North Miami General Hospital.

17. At all times material herein the individual Defendant M.D.s taken together comprised the Orthopedic Section of the Department of Surgery of the medical staffs at both Parkway General Hospital and North Miami General Hospital.

18. In 1975, the Plaintiff applied for medical staff privileges in the specialty of podiatry at Parkway General Hospital and North Miami General Hospital.

19. That the Orthopedic Section of the medical staff at Parkway General Hospital and at North Miami General Hospital, which were both comprised of the Defendants, recommended that the Plaintiff be granted privileges only in the most minor aspects of the practice of podiatry which could be described as minor surgery or topical treatments of the skin.

20. That the Plaintiff is competent and qualified to practice podiatry at Parkway General Hospital and North Miami General Hospital and met the requirements of the By-Laws for such practice and there was no good faith basis for the recommendation to limit privileges of the Plaintiff to minor surgery or topical treatments of the skin.

21. The recommendations of the Orthopedic Section of the medical staff of the respective hospitals were arbitrary, capricious, frivolous, and utterly devoid of any good faith criteria related to the proper practice of podiatry or the provision of health care generally.

22. That the recommendations against the application of Dr. Mark Feldman for full podiatric privileges at the respective hospitals including podiatric surgery were so devoid of any basis that it can be said they were motivated only by a malicious discrimination against podiatry and an anti-competitive intent.

23. Pursuant to By-Law procedures for review, the Plaintiff contested the limited recommendations of the Orthopedic Sections of the medical staffs of the respective hospitals regarding his applications for privileges.

24. At Parkway General Hospital, after full hearing before the Board, the Board of Trustees of that Hospital reversed or over-ruled the recommendation of the Orthopedic Section of the Department of Surgery and granted the Plaintiff full medical staff privileges in the specialty of podiatry including all podiatric surgery.

25. The recommendation from the Orthopedic Section of the Department of Surgery at North Miami Hospital was still in the process of being contested by way of hearing and appellate review in 1977 when other acts of the Defendants intervened to change the course of Plaintiff's future as hereinafter described.

26. In 1977, pursuant to the full Podiatric Surgical Medical Staff privileges granted to him at Parkway

General Hospital, Plaintiff performed a flat foot repair procedure on an 11-year old boy which involved the implantation of a celastic material in the sub-talor joint of the foot.

27. The said surgical procedure was and remains a recognized and accepted procedure within the profession of Podiatry; and it was indicated in this instance under the circumstances, performed in a competent manner and the patient enjoyed a good result.

28. Thereafter, the Orthopedic Section of the Medical Staff at Parkway General Hospital, which was made up of the individual Defendants herein, adopted a rule or regulation for the Hospital medical staff which prohibited medical staff podiatrists, which included only the Plaintiff, from performing the above referenced

celastic implant procedure for flat foot. ("A" Attached)

29. The said rule curtailing Plaintiff's privileges at Parkway General Hospital was arbitrary, capricious, frivolous, and utterly devoid of any good faith criteria related to the proper practice of podiatry or the provision of health care generally.

30. The regulation prohibiting the performance of such surgeries by a podiatrist on the medical staff at Parkway General Hospital represented a curtailment of the full medical staff privileges enjoyed by the Plaintiff at said facility.

31. After the curtailment of medical staff privileges of the Plaintiff at Parkway General Hospital in regard to the celastic implant procedure, Plaintiff's application for

medical staff privileges at North Miami General Hospital was finally denied.

32. That the actions of the Defendants in denying Plaintiff's application for full medical staff privileges at North Miami General Hospital and curtailing Plaintiff's medical staff privilege at Parkway General Hospital to perform a certain celastic implant procedure described above were frivolous, arbitrary and capricious and utterly devoid of any good cause such that the only motive for the action was a malicious discrimination against podiatry and an anti-competitive intent to injure the Plaintiff's practice of podiatry.

33. That the curtailment of Plaintiff's medical staff privileges at Parkway General Hospital by elimination of his privilege to

perform the celastic implant procedure was taken without notice of such intended action to the Plaintiff, with no opportunity to the Plaintiff to know the basis of any allegations against him, to appear and defend himself, to a fair hearing or to appellate review. ("C-1" Attached and "C-2", and "C-3")

34. That the utter lack of good cause for Defendant's actions and the failure to provide due process to the Plaintiff prior to curtailment of his medical staff privileges was in violation of F.S. 395.065 which required that denial or curtailment of privileges be only for good cause and that procedures for such action comply with the standards, outlined by the Joint Commission of Accreditation of Hospitals which Standards in turn require full due process prior to

curtailment of medical staff privileges. ("D" Attached)

35. As a direct and proximate result of the actions of the Defendants taken, without good cause, in bad faith and with malice, Plaintiff has suffered serious damage to his reputation and he has been held up to ridicule and public contempt, he has been humiliated and suffered great mental and emotional distress and loss of enjoyment of life therefrom, he has lost profits from his business in the past and he has lost earning capacity in the future, he has incurred great expense for the defense of his medical staff privileges as described herein and further he has lost interest on the income he would have earned in the past to present; all of said injuries are continuing and permanent in nature.

WHEREFORE, Plaintiff demands judgment against the Defendants for compensatory an punitive damages, costs of this action and further demands trial by jury on all issues so triable as of right.

COUNT II

36. All preceding paragraphs are realleged and incorporated herein by this reference.

37. That the curtailment of the privileges of the Plaintiff at Parkway General Hospital without notice of the charges, opportunity for hearing or appellate review were in violation of the By-Laws, Rules and Regulations of Parkway General Hospital which require such procedures prior to curtailment of medical staff privileges. ("D, E-1,-3)

38. As a direct and proximate result of the violation of the By-Laws of Parkway General Hospital, Plaintiff's medical staff privileges were curtailed at that Hospital; and that decision was communicated to North Miami General Hospital and Mount Sinai Hospital where that action was the cause of ultimate denial of his medical staff privileges at that Hospital. ("C-5" Attached F, G, H, I, J)

39. As a further direct and proximate result of the Defendants' actions in curtailing medical staff privileges of the Plaintiff at Parkway General Hospital, Plaintiff has suffered serious damage to his reputation and he has been held up to ridicule and public contempt, he has been humiliated and suffered great mental and emotional distress and loss

of enjoyment of life therefrom, he has lost profits from his business in the past and he has lost earning capacity in the future, he has incurred great expense for the defense of this medical staff privileges as described herein and further he has lost interest on the income he would have earned in the past to the present; all of said injuries are continuing and permanent in nature.

WHEREFORE, Plaintiff demands judgment against the Defendants for compensatory and punitive damages, costs of this action and further demands trial by jury on all issues so triable as of right.

COUNT III

40. All introductory paragraphs and all paragraphs of Count I are realleged and incorporated herein by this reference.

41. At the meeting curtailing Plaintiff's privilege to do the celastic implant procedure, the Defendants, each and every one of them, stated, voted upon and approved a statement that the performance of the flat foot surgical procedure on the eleven-year old boy, involving the implantation of a celastic material in the sub-talor joint, was an experimental procedure. ("A" Attached)

42. The Defendants placed such statement in the records of the Orthopedic Section of the Surgical Department at Parkway General Hospital and in the records of the Orthopedic Section of the Surgical Department at North Miami General Hospital.

43. Furthermore, the Defendants caused said statement to be published to:

(a) Parkway General Hospital Executive Committee members on December 13, 1976;

(b) Parkway Medical Records and Audit Committee on February 3, 1977.

(c) Robert Raskin, M.D.

(d) Gladys Alvarez, M.D.

(e) Jordan Davis, M.D.

(f) Richard Fein, M.D.

(g) Walter Gassner, M.D.

(h) Bruce Cash, Assistant Administrator

(i) Natalie Caudill, Director, Medical Records

(j) Shelia Whitmore Medical, Care Evaluation Coordinator

(k) Wilma Smith, Assistant Director of Nursing

(l) Lorraine Flynn, Nursing Audit Chairman

(m) Sue Foley, Former Chairman, Nursing Audit Committee

(n) Ted Hirschberger, Administrative Resident

(o) Millie Lanes, Medical Staff Secretary

(p) Chairman, Department of Surgery, University of Miami, School of Medicine

(q) C. Rollins Hanlon, Director, American College of Surgeons

(r) Morton Frieman, M.D.

(s) Salvador Ginori, M.D.

(t) Bruce Julien, M.D.

(u) John Maclure, M.D.

(v) Howard Sanford, M.D.

(w) Bruce Cash, Assistant Administrator

(x) Alica Belinotti, Assistant Administrator, Nursing

(y) Jean Brierton, Assistant Medical Staff Secretary

(z) Bernard Seidenberg, M.D.

(aa) Gary Stone, M.D.

(bb) E. Wayne Christopher, Executive Director

(cc) Executive Committee, 1977, 1978

("C-4d," and "B" Attached; "C-4a," "C-4b," "C-4c")

44. The fact that the Defendants, comprising the Orthopedic Section of the Surgery Department at the two hospitals described herein opposed granting medical staff privileges to the Plaintiff without good cause

arbitrarily and capriciously in the first instance and later curtailed the Plaintiff's privilege to perform the celastic implant procedure arbitrarily and capriciously and without good cause is extrinsic evidence of malice toward the Plaintiff since there is no justification for such opposition whatsoever other than discrimination and an anti-competitive intent.

45. Plaintiff anticipates that Defendants will raise a privilege pursuant to F. S. 768.40 in this cause in regard to peer review committee records, evidence and events. Plaintiff asserts that the Statute is unconstitutional in that it conflicts with Article I, Section 21 of the Florida Constitution.

46. The statute conflicts with Florida Statutes 394.0653 et. seq. in that the Hospital licensing law which

mandates procedural and substantive due process. The State mandated hearing process makes clear that the evidence necessary for this State mandated due process be surrendered to the accused. Any impediment to this proceeding cannot stand.

47. The characterization of the procedure performed by the Plaintiff as an experimental procedure is false and defamatory of the Plaintiff in his profession.

48. As a direct and proximate result of the malicious defamatory statement of the Defendants published as described herein, the Plaintiff has suffered serious damage to his reputation and he has been held up to ridicule and public contempt, he has been humiliated and suffered great mental and emotional distress and loss of enjoyment of life therefrom, he has

lost profits from his business in the past and he has lost earning capacity in the future, he has incurred great expense for the defense of his medical staff privileges as described herein and further he has lost interest on the income he would have earned in the past to the present; all of said injuries are continuing and permanent in nature.

WHEREFORE, Plaintiff demands judgment against the Defendants for compensatory and punitive damages, costs of this action and further demands trial by jury on all issues so triable as of right.

COUNT IV

49. All introductory paragraphs and Paragraphs of Count I are realleged and incorporated herein by this reference.

50. That the individual Defendants as a group comprising as is described herein, the orthopedic Sections of the Surgical Departments of the Medical Staffs of Parkway General Hospital and North Miami General Hospital taken together exercised substantially greater economic power to control the practice of orthopedics and podiatry at said hospitals than they would have acting individually.

51. That the Defendants did act in concert together at both hospitals with the intent to exercise power to blackball podiatrists, and the Plaintiff in particular, from having full podiatric surgical privileges at the said hospitals.

52. That the concerted action was taken intentionally, knowingly and without good cause and with an anti-competitive intent to deprive the Plaintiff of his livelihood.

53. As a direct and proximate result of the conspiracy to deprive the Plaintiff of his livelihood, Plaintiff has suffered serious damage to his reputation and he has been held up to ridicule and public contempt, he has been humiliated and suffered great mental and emotional distress and loss of enjoyment of life therefrom, he has lost profits from his business in the past and he has lost earning capacity in the future he has incurred great expense for the defense of his medical staff privileges as described herein and further he has lost interest on the income he would have earned in the past to the present; all of said injuries are continuing and permanent in nature.

WHEREFORE, Plaintiff demands judgment against the Defendants for compensatory and punitive damages,

costs of this action and further demands trial by jury on all issues so triable as of right.

COUNT V

54. All introductory paragraphs and Paragraphs of Count I are realleged and incorporated herein by this reference.

55. At the time of the incidents described herein, the State of Florida had announced a clearly defined policy to require health care peer review and in that regard to provide a system for orderly and fair quality control within the health care professions. See F.S. Chapter 395. et. seq. and F.S. 768.40 and Rules and Regulations of the Department of Health and Rehabilitative Services Section 10D-28 et. seq.

56. That the State regulatory plan in this area was so comprehensive as to have elevated the hospital peer review process to the level of state action.

57. The Defendants herein were at all times material acting under color of state law.

58. The action of the Orthopedic Section of the medical staffs of North Miami General Hospital to deny Plaintiff's application for full podiatric privileges and the action of the Orthopedic Section of the medical staff at Parkway General Hospital to curtail Plaintiff's privilege to perform the flat foot procedure were arbitrary, capricious and without good cause in violation of Plaintiff's right to equal protection and due process.

59. The denial of notice and hearing before curtailment of Plaintiff's privileges to perform the flat foot procedure denied Plaintiff's right to due process.

60. The Defendants' actions violated Title 42 USCA Section 1983.

61. The actions of Defendants were so arbitrary, capricious and wholly lacking in any good faith basis that said actions could only have been motivated by a malicious anti-competitive intent to destroy Plaintiff's livelihood.

62. As a direct and proximate result of the Defendants wrongful acts, the Plaintiff suffered serious damage to his reputation and he has been held up to ridicule and public contempt, he has been humiliated and suffered great mental and emotional distress and loss of enjoyment of life

therefrom, he has lost profits from his business in the past and he has lost earning capacity in the future, he has incurred great expense for the defense of his medical staff privileges as described herein and further he has lost interest on the income he would have earned in the past to the present; all of said injuries are continuing and permanent in nature.

WHEREFORE, Plaintiff demands judgment against the Defendants for compensatory and punitive damages, costs of this action and further demands trial by jury on all issues so triable as of right.

COUNT VI

63. All introductory paragraphs are realleged and incorporated herein by this reference.

64. That Defendants combined to and did exercise their power at two hospitals to restrain trade and commerce in this state in the redition of health care services in violation of F.S. 542.18.

65. Defendants combination as described was an attempt to monopolize a part of trade or commerce in this state, specifically the rendition of care and treatment of the foot and ankle at the two hospitals described in violation of F.S. 542.19.

66. As a direct and proximate result of the Defendants wrongful acts, the Plaintiff suffered serious damage to his reputation and he has been held up to ridicule and public contempt, he has been humiliated and suffered great mental and emotional distress and loss of enjoyment of life therefrom, he has lost profits from

his business in the past and he has lost earning capacity in the future, he has incurred great expense for the defense of his medical staff privileges as described herein and further he has lost interest on the income he would have earned in the past to the present; all of said injuries are continuing and permanent in nature.

WHEREFORE, Plaintiff demands judgment against the Defendants for threefold the damages sustained plus costs of this action and further demands trial by jury.

_____

DR. MARK FELDMAN

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

mailed this 8 day of October, 1988 to: Dan Paul, Esquire, 701 Brickell Avenue, Miami, Florida 33131.

DR. MARK FELDMAN
899 N.W. 214th Street
Apartment 101
North Miami, Florida 33169
305-652-9444
305-949-1600

ORTHOPEDIC SURGERY

Joel B. Dennis, M.D.
Lloyd A. Moriber, M.D.
Melvyn G. Drucker, M.D.
Diplomates, American Board of
Orthopedic Surgery

Kenneth R. Hodor, M.D.
Robert S. Ennis, M.D.
190 Northwest 169th Street
North Miami Beach, Florida
33169
Telephone 305-682-6060

March 1, 1977

Robert Raskin, M.D., Chairman
Medical Audit & Record Committee
Parkway General Hospital
160 N.W. 170th Street
North Miami Beach, Florida

ATT: Millie Lanes

Dear Dr. Raskin:

The Orthopedic Department has gone on record as opposing experimental podiatric type procedures such as the placing of a penile silastic implant for treatment of flexible valgus flat feet.

Sincerely yours,

Joel B. Dennis, M.D., Chairman
Department of Orthopedic Surgery

"A"

PARKWAY GENERAL HOSPITAL

MEDICAL RECORDS/AUDIT COMMITTEE

March 3, 1977

A meeting of the Medical Records/Audit Committee was called to order by Robert Raskin, M.D., Chairman, at 12:00 noon on March 3, 1977. The meeting was held in the Board Room.

Present: Robert Raskin, M. D., Chairman
Lewis Dan, M. D.
Richard Fein, M. D.
Norton Freiman, M. D.
Salvador Ginori, M. D.
Bruce Julien, M. D.
John Maclure, M. D.
Howard Sanford, M.D.

Absent: Gladys Alvarez, M. D.
Jordan K. Davis, M. D. (out of to
Walter Gassner, M. D.
Bertram Grapin, M. D.
Bernard Seidenberg, M. D. (sick
Gary Stone, M. D.

Also Present: Bruce Cash, Assistant Administrator - Operations
Alicia Belinotti, Assistant Administrator - Nursing
Suzanne Foley, R. N., Admin. Supv.
Lorraine Flynn, R. N., Chairman, - Nursing Audit
Natalie Caudill, Director, Medical Records
Sheila Whitmore, Medical Care Evaluation Coordinator
Jean Brierton, Assistant Medical Staff Secretary

"B" (continues)

MINUTES: The Minutes of the previous meeting were reviewed and approved.

COMMUNICATIONS: Doctor Raskin read the responses received regarding queries sent by the Committee regarding an experimental procedure performed by a Podiatrist. In eight hospitals polled, the treatment has not been an allowable procedure. Our own Orthopedic Department has gone on record as opposing the treatment, which involves placing of a silastic implant, sub-talar joint bilateral for diagnosis of Flexible Valgus Flatfoot. It was recommend that the matter be discussed with the Doctor involved.

PARKWAY GENERAL HOSPITAL

MEDICAL RECORDS/AUDIT COMMITTEE

April 7, 1977

A meeting of the Medical Records/Audit Committee was called to order at 12:00 noon by Robert B. Raskin, M.D., Chairman, on April 7, 1977, in the Board Room.

Present: Robert Raskin, M. D., Chairman
Gladys Alvarez, M. D.
Lewis Dan, M. D.
Jordan K. Davis, M. D.
Joel Dennis, M. S.
Walter Gassner, M. D.
Bruce Julien, M. D.
Howard Sanford, M.D.
Bernard Seidenberg, M. D.
Gary Stone, M. D.

Absent: Richard Fein, M. D.
Norton Freiman, M. D.
Bertram Grapin, M. D.
John Maclure, M. D.
Salvador Ginori, M. D. (call

Also Present: E. Wayne Christopher, Executive Director
Alicia Belinotti, Assistant Administrator - Nursing
Lorraine Flynn, R. N., Chairman, - Nursing Audit
Suzanne Foley, R. N., Admin. Supervisor
Natalie Caudill, Director, Medical Records
Sheila Whitmore, Medical Care Evaluation Coordinator
Ted Hirschberger, Administrative Resident
Jean Brierton, Assistant Medical Staff Secretary

"C-1" (continues)

MINUTES: The Minutes of the previous meeting were read and approved, after full discussion of each item, as outlined below.

COMMUNICATIONS: Doctor Raskin read aloud the response received from the American College of Surgeons (Chicago, Illinois) evoked by our inquiry regarding the propriety of an experimental procedure performed by a Podiatrist (and discussed at previous meetings of the Committee). The response was somewhat laconic, stating only that: "The College does not provide specific opinions on propriety of procedures in individual instances. In eight hospitals previously polled by this Committee, the procedure had not been allowed. Our Orthopedic Department has gone on record as opposing the treatment (a silastic implant, sub-talar joint, bilateral for diagnosis of Flexible Valgus Flatfoot). Following additional discussion, motion was made that the matter be referred to the Executive Committee with this Committee's recommendation that silastic implants such as the one cited should not be allowable procedures by Podiatrists in this Hospital.

Medical Record and Audit Committee - The recommendation that "silastic implants should not be allowable procedures by Podiatrists in the hospital" was discussed and approved.

April 7, 1977

Jerome Moskowitz, M.D.
Chief of Staff
Parkway General Hospital
North Miami Beach, Florida 33169

Dear Doctor Moskowitz:

At today's meeting of the Medical Record/Audit Committee, it was suggested that the Executive Committee be advised of our recommendation regarding silastic implants.

"Motion was made that silastic implants by Podiatrists should not be an allowable procedure in the Hospital, and recommendation to this effect be forwarded to the Executive Committee."

This is the result of an experimental procedure performed by a Podiatrist of eight hospitals polled regarding the procedure, it was not permitted in any of the eight. Our own Orthopedic Department opposes the treatment.

Cordially,

Robert B. Raskin, M.D.
Chairman

cc: Credentials Committee

RBR/jb

"C-3"

PARKWAY GENERAL HOSPITAL

MEDICAL RECORDS AND AUDIT COMMITTEE

February 3, 1977

A meeting of the Medical Records and Audit Committee was called to order at 12:20 p.m. by Robert Raskin, M.D., Chairman, in the Board Room on February 3, 1977.

Present: Robert Raskin, M. D., Chairman
Gladys Alvarez, M. D.
Lewis R. Dan, M. D.
Jordan K. Davis, M. D.
Richard Fein, M. D.
Walter Gassner, M. D.

Absent: Joel Dennis, M. S. (in surgery)
Norton Freiman, M. D. (called)
Salvador Ginori, M. D. (called)
Bertram Grapin, M. D.
Bruce Julien, M. D.
John Maclure, M. D.
Bernard Seidenberg, M. D. (ill)
Gary Stone, M. D.

Also Present: Bruce Cash, Assistant Administrator
Natalie Caudill, Director, Medical Records
Mrs. Sheila Whitmore, Medical Care Evaluation Coordinator
Mrs. Wilma Smith, Assistant Director of Nursing
Mrs. Lorraine Flynn, Nursing Audit Chairman
Mrs. Sue Foley, Former Chairman, Nursing Audit Committee
Ted Hirschberger, Administrative Resident
Mrs. Millie Lanes, Medical Staff Secretary

ROBERT B. RASKIN, M.D.
Neurology P.A.

Telephone
652-2092

16800 N.W. 2nd Avenue
Suite 300
Miami, Florida 33169

February 17, 1977

Dear Doctor:

I am Chairman of Medical Records Audit Committee of Parkway General Hospital, North Miami Beach, Florida. This letter is being written in response to queries on the part of members of our Orthopedic Department regarding Celastic implant, sub-talar joint; bilateral for diagnosis of Flexible Valgus Flatfoot. This procedure was performed by a Podiatrist on a nine year old child.

The Orthopods question the ethics of performing this "experimental" or thus for unproven procedure by a Podiatrist. I would greatly appreciate your comments, feelings, etcetera regarding this issue. If you prefer, your comments will be anonymous. This is an internal matter at Parkway General Hospital and no litigation is involved.

Respectfully yours,

Robert B. Raskin, M.D.

RBR/bsd

Chairman, Department of Surgery
University of Miami School of Medicine
1700 Northwest 10th Avenue
Miami, Florida 33136

ROBERT B. RASKIN, M.D.
Neurology P.A.

Telephone
652-2092

16800 N.W. 2nd Avenue
Suite 300
Miami, Florida 33169

February 17, 1977

Dear Doctor:

I am Chairman of Medical Records Audit Committee of Parkway General Hospital, North Miami Beach, Florida. This letter is being written in response to queries on the part of members of our Orthopedic Department regarding Celastic implant, sub-talar joint; bilateral for diagnosis of Flexible Valgus Flatfoot. This procedure was performed by a Podiatrist on a nine year old child.

The Orthopods question the ethics of performing this "experimental" or thus for unproven procedure by a Podiatrist. I would greatly appreciate your comments, feelings, etcetera regarding this issue. If you prefer, your comments will be anonymous. This is an internal matter at Parkway General Hospital and no litigation is involved.

Respectfully yours,

Robert B. Raskin, M.D.

RBR/bsd

C. Rollins Hanlon, M.D., Director
American College of Surgeons
55 East Erie Street
Chicago, Illinois 60611

AMERICAN COLLEGE OF SURGEONS

Founded by Surgeons of the
United States and Canada, 1913

55 East Erie Street Chicago,
Illinois 60611
Area Code 312-664-4050

C. Rollins Hanlon, M.D., F.A.C.S.
Director

March 17, 1977

Robert B. Raskin, M.D., P.A.
16800 N.W. 2nd Avenue
Miami, Florida 33169

Dear Doctor Raskin:

The College does not provide specific opinions on propriety of procedures in individual instances, such as the one you mention. I am sorry not to be of more help.

Best wishes.

Sincerely,

C. Rollins Hanlon,
M.D., F.A.C.S.

CRH:jk

Charles Weiss, M.D. P.A.

Mount Sinai Medical Center
4300 Alton Road, Miami Beach, Florida 33140
(305) 674-2085

Chairman Department of
Orthopedics & Rehabilitation

November 9, 1978

Mr. Sidney Golden
Associate Director

Re: Dr. Mark Feldman

Dear Sid:

It has come to my attention that a Parkway Hospital patient by the name of Scott Lilien, a 7-year-old child was operated on by Dr. Feldman on July 22, 1976. His hospital chart number is 56104.

At that time it is alleged that a tendon Achilles' lengthening was done for hyper-mobile flat foot and a penile implant was placed in the sub-talar joint, a counter-indicated procedure.

Very truly yours,

Charles Weiss, M.D.

CW/11

AFFILIATE STAFF - Podiatry

Mark Feldman, D.P.M. - Based on comments from the Chief of the Division of Orthopedics, as approved by the Chairman of the Department of Surgery, it was recommended that he be reappointed to the Affiliate Staff but that his surgical privileges be withheld pending review of a chart referred to the Audit Committee. The Executive Committee did not approve the latter part of the recommendation inasmuch as privileges cannot be revoked without a hearing. It was agreed that a decision could be made after a recommendation is presented by the Audit Committee.

The Executive Committee accepted the report with the exception of the recommendation relative to Doctor Mark Feldman.

BY-LAWS

AND

RULES AND REGULATIONS

MEDICAL STAFF

PARKWAY GENERAL HOSPITAL, INC.
160 NW 170th Street
North Miami Beach, Florida 33169

American Medical International Inc.
Health Care Center

Sec. 3.70 APPEALS:

Sec. 3.71-1 In any case where the Executive Committee of the Medical Staff does not recommend reappointment or advancement mended by the Executive Committee, the Executive Director shall notify the Physician and/or Dentist concerned by certified or registered mail.

Sec. 3.71-2 At the same time, he must be advised that if he wishes a hearing, he must submit a written request to the Executive Director within ten days after personal receipt of such notice.

Sec. 3.71-3 Failure to request a hearing in writing during the prescribed time constitutes a waiver of the applicant's right to hearing and appeal.

Sec. 3.71-4 Should he exercise this privilege, he shall be given the opportunity of appearing before the Credentials Committee and the Joint Conference Committee in joint session at the next regular meeting of the Joint Conference Committee.

Sec. 3.72 After a hearing, as outlined above, the Joint Conference Committee shall make recommendations to the Governing Body, which Body shall transmit its decision to the affected Physician and/or Dentist through the Executive Director.

Sec. 3.73-1 The Governing Body shall always have the right to suspend or remove any member from the Staff or deprive any member of the Staff of the privileges of the Hospital whenever the good of the Hospital or the patients may determine it after meeting with the Executive Committee of the Medical Staff.

"E1" (continues)

("E1" continued)

Sec. 3.73-2 However, in any case in which the Governing Body takes action contrary to the Medical Staff's recommendation concerning appointments or privileges, the matter shall first be reviewed at a special meeting of the Joint Conference Committee.

Sec. 3.73-3 This meeting must be held within ten days of announcement by the President of the Medical Staff.

Sec. 3.73-4 If the issues cannot be resolved, the aggrieved party may submit within ten days a written request to the Governing Body to reconsider the matter.

Sec. 3.73-5 The Governing Body shall arrange for a hearing to be held before its Executive Committee within ten days of receipt of request and shall send notice of the date and time of the hearing by registered or certified mail to the appellant.

Sec. 3.73-6 A final decision of the Governing Body shall be rendered within ten days after the date of this hearing.

Sec. 3.73-7 A three-quarter vote of the entire Governing Body shall be required any time the recommendations of the Executive Committee of the Medical Staff regarding appointment, dismissal or suspension from the Staff are opposed by the Governing Body.

Sec. 3.74 All applicants, as well as members of the Medical Staff, consent to the release of pertinent information for any purpose set forth in these By-Laws and release from liability and agree to hold harmless any person or entity furnishing or releasing such information concerning his application or Medical Staff status.

Sec. 3.80 TEMPORARY SUSPENSION:

Sec. 3.81 The Executive Committee of the Medical Staff shall be authorized to recommend to the Governing Body that a Staff member's privileges be suspended for disciplinary purposes. The grounds for such suspension of privileges include:

A. Violations of the By-Laws, Rules and Regulations.

B. Conduct that is inimical to the Hospital and/or its Staff.

C. Notification from the State Board of Medical Examiners of the revocation or suspension of a Staff member's license.

D. Failure to complete Medical Records within a prescribed time after the discharge of a patient.

Sec. 3.82 An opportunity for the Staff member concerned to have a hearing shall be afforded as provided in Section 3.70.

Sec. 7.01 Committees shall be standing and special.

Sec. 7.01-1 The Standing Committees shall be:

A. Accreditation Committee
B. Credentials Committee
C. Disaster Control Plans Committee
D. Emergency Room Committee
E. Executive Committee
F. Infections Control Committee
G. Intensive Care Committee
H. Joint Conference Committee
I. Medical Records and Audit Committee
J. Nominating Committee
K. Patient Care Committee
L. Pharmacy Committee
M. Respiratory Therapy Committee
N. Tissue and Surgical Evaluation Committee
O. Transfusions Committee
P. Utilization Committee

Sec 7.02-2 Such Committees shall confine their work to the purposes for which they were appointed and shall report to the Executive Committee of the Medical Staff.

NORTH MIAMI GENERAL HOSPITAL

CREDENTIALS COMMITTEE

APRIL 1, 1980

The meeting was called to order at 8:15 a.m. by the Chairman Dr. Bertram Grapin.

Those present were:

Dr. Albert Cohen
Dr. Harvey Glasser
Dr. Stephen Glucroft
Dr. Bertram Grapin
Dr. Arthur Miller
Dr. Martin Rosenbluth
Mr. Robert Connors

The minutes of the previous meeting were read and approved.

I. OLD BUSINESS:

A. Request by Mark H. Feldman, D.P.M. for surgical privileges, recommended from the Department of Orthopedics. The Committee recommended that he maintain privileges as they presently are.

NORTH MIAMI GENERAL HOSPITAL

DEPARTMENT OF ORTHOPEDICS

APRIL 1, 1980

The meeting was called to order at 6:30 p.m. by the Chairman, Dr. Stephen Turbin.

See sign-in book for those members present.

Minutes of the previous meeting were approved as read.

NEW BUSINESS

The question of Podiatrist privileges was discussed. A committee including Dr. Nadler, Dr. Goldman and Dr. Ennis was created to report back to the Department their recommendations regarding privileging of Podiatrists at North Miami General Hospital and at Parkway.

There being no further business, the meeting adjourned at 7:30 p.m.

Respectfully submitted,

Barry Silverman, M.D.
Secretary,
Orthopedic Department

Stephen Turbin, M.D.,
Chairman

BS:el

A Non-Profit Community Hospital

NORTH MIAMI GENERAL HOSPITAL, INC.

1701 NE 127th Street
North Miami, Florida 33181
Telephone (305) 891-3550

June 20, 1980

Mark H. Feldman, D.P.M.
16875 N.E. 15th Avenue
North Miami Beach, Florida 33162

Dear Dr. Feldman:

At the last meeting of the Executive Committee held on June 10, 1980, the following surgical procedures were approved:

1) Incision and drainage, infected or not infected cyst.
2) Incision and drainage of furuncle.
3) Incision and drainage of abcess.
4) Drainage of onychia.
5) Drainage of hematoma.
6) Puncture aspiration of abcess.
7) Pairing or curettment of a benign lesion, or chemical cautery.
8) Biopsy of skin or sub. Q.
9) Nail avulsion.
10) Excision of nails.
11) Reconstruction of the nail bed.
12) Wound repair of the feet.
13) Cyro surgery.
14) Incision of superficial abcess.

"I" (continues)

"I" continued

15) Drainage of infected bursae.
16) Arthrocentesis.
17) Tenolysis, single open.
18) Tenotomy, sub. Q. toe.
19) Excision of ganglion.

It is the writer's responsibility to advise you of your rights to a hearing pursuant to Article VII of the Medical Staff By-Laws and to specify that you have 30 days from the receipt of this letter to request said hearing. Failure to do so within the time period shall constitute a waiver of your rights thereto.

Should we receive a request for a hearing, you will be notified within 10 days after receipt of that request of the date, time and place for a hearing.

Sincerely,

Robert O. Bruce, F.A.C.H.A.
Executive Vice President

ROB:bak
cc: President, Medical Staff

NORTH MIAMI GENERAL HOSPITAL

DEPARTMENT OF ORTHOPEDICS

JUNE 2, 1981

The meeting was called to order at 6:20 p.m. by the Chairman, Dr. Stephen Turbin.

See sign-in book for members present.

Minutes of the previous meeting were approved.

OLD BUSINESS:

Dr. Turbin presented criteria regarding podiatric privileges proposed by the subcommittee chaired by Dr. Goldman. There was a great deal of discussion regarding these proposed privileges and finally a motion was made that -

> "THE DEPARTMENT REAFFIRMS ITS PREVIOUS POSITION TO ONLY ALLOW PODIATRISTS TO PERFORM SOFT TISSUE SURGERY UNDER LOCAL ANESTHESIA ABOUT THE FOREFOOT."

Motion passed. In addition, it was moved that -

> "DR. GOLDMAN ATTEND THE EXECUTIVE COMMITTEE MEETING TO EXPLAIN THE POSITION OF THE ORTHOPEDIC DEPARTMENT IN REGARD TO GRANTING SURGICAL PRIVILEGES TO PODIATRISTS."

This motion passed unanimously.

NEW BUSINESS

A letter was presented by Dr. Turbin which had been received from Dr. Fass. This dealt with credentials of Arthroscopy. A great deal of discussion ensued, following which a motion was made -

> "THAT ALL MEMBERS OF THE DEPARTMENT WHO ARE BOARD-ELIGIBLE OR BOARD-CERTIFIED BE ALLOWED TO DO ANY ORTHOPEDIC PROCEDURES IN THE FUTURE.

This motion passed.

Mr. Drew Troeder gave a scientific presentation on a new knee instrument system for a total knee replacement.

The meeting was adjourned at 8:30 p.m.

Respectfully submitted:

Barry J. Silverman, M.D.
Secretary

BJS/adw

Regarding the development of criteria for granting surgical podiatric privileges, the Committee's consensus was to recommend support of the Department of Orthopedic's previous stand, that podiatric surgery be restricted to soft tissue surgery procedures done under local anesthesia.

There being no further business, the meeting was adjourned at 8:50 a.m.

Respectfully submitted:

David C. Hillman, M.D.
Chairman

DCH/adw

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL PAGINATION IS NOT COUNTINUOUS.

(3)

91-1278
NO. _____

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE,

Petitioner,
vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME
COURT FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FROM A JUDGMENT FROM THE SUPREME COURT OF FLORIDA

DR. MARK FELDMAN, PRO SE,

15529 Bull Run Road
Miami Lakes, Florida 33014
(305) 557-8600

PETITIONER IN PRO SE

APPENDIX VOL II

APPENDIX A:

ORDER OF SUPREME COURT OF FLORIDA OF 11/5/91 WHICH DENIED PETITIONER'S PETITION FOR CERT.

APPENDIX B:

ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEALS OF 7/11/91 DENYING MOTION FOR REHEARING

APPENDIX C:

OPINION OF FLORIDA THIRD DISTRICT COURT OF APPEALS OF 5/28/91 AFFIRMING SUMMARY JUDGMENT

APPENDIX D:

OPINION OF FLORIDA SUPREME COURT OF 2/4/88, CITED 522 So.2d 798 (FLA.1988) REMANDING CASE TO TRIAL COURT TO ALLOW AMENDED COMPLAINT

APPENDIX E:

PETITIONER/PLAINTIFF'S SECOND AMENDED COMPLAINT PERSUANT TO OPINION OF THE FLORIDA SUPREME COURT

APPENDIX F:

OPINION OF FLORIDA THIRD DISTRICT COURT OF APPEALS OF 11/28/89, CITED AT 553 So.2d 282 (3DCA 1989) DENYING CERT. ON THE APPLICATION OF BOND POSTING REQUIREMENT

APPENDIX G:

EXCERPTS OF DEPOSITION TAKEN FOR TRIAL OF PETITIONER/PLAINTIFF'S EXPERT DR. SCHOENHAUS 8/8/90

APPENDIX H:

A COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS

APPENDIX I:

DEPOSITION OF PLAINTIFF'S WITNESS DR. ROBERT RASKIN TAKEN FOR TRIAL 7/27/90

APPENDIX F

Mark H. FELDMAN, D.P.M., Petitioner,

v.

Stephen GLUCROFT, M.D., et al., Respondents.

No. 89-494.

District Court of Appeal of Florida, Third District.

Nov. 28, 1989.

Podiatrist brought defamation action against members of medical review committee. The Circuit Court for Dade County, Jack M. Turner, J., granted members' motion for summary judgment, and podiatrist appealed. The District Court of Appeal, 488 So.2d 574, affirmed, but the Supreme Court, 522 So.2d 798, vacated and remanded. On remand, the Circuit Court for Dade County, Jack Turner, J., dismissed new claims because podiatrist failed to post bond, and podiatrist filed petition for common law certiorari. The District Court of Appeal held that order partially settling pleadings was not subject to interlocutory appeal and was not proper matter for certiorari.

Petition denied.

FELDMAN v. GLUCROFT
CITE as 553 So.2d 282 (Fla.App 3 Dist. 1989)

Mark H. Feldman, in pro. per.

Tew, Jorden, Schulte & Beasley and Dan Paul and Steven M. Katzman, James J. Gilmour, Miami, for respondents.

Charles J. Powers, Fort Lauderdale, for the Academy of Florida Trial Lawyers as amicus curiae.

Robert A. Butterworth and Walter M. Meginniss, Tallahassee, for the State of Florida as amicus curiae.

Before NESBITT, FERGUSON and LEVY, JJ.

PER CURIAM.

This is a petition for common law certiorari. We deny the petition on jurisdictional grounds.

Petitioner Feldman brought a defamation action against members of a medical review committee. The circuit court granted the defendants' motion for summary judgment and the podiatrist appealed. This court affirmed, holding that a defamation action could not be maintained against medical review committee members and the hospital they serve due to the privilege established by section 768.40(4), Florida Statutes (1983), See Feldman v. Glucroft, 488 So.2d 574 (Fla. 3d DCA 1986).

FELDMAN v. GLUCROFT
CITE as 553 So.2d 282 (Fla.App 3 Dist. 1989)

1. **Appeal and Error** 80(6)
District Court of Appeal is not authorized to review order partially settling pleadings by way of plenary appeal unless motion to dismiss or strike is granted with respect to separate and distinct controversy.

2. **Appeal and Error** 80(6)
Order dismissing new claims due to plaintiff's failure to post bond was not subject to review by way of plenary appeal because claims dismissed did not represent controversies distinct from remaining viable claim.

3. **Certiorari** 7
District Court of Appeal may not entertain petition for writ of common law certiorari to review order partially settling pleadings.

4. **Certiorari** 5(2), 29
Petitioner for common law certiorari must demonstrate both departure from essential requirements of law and lack of adequate remedy by appeal after judgment.

5. **Certiorari** 5(2), 7
Circuit court order dismissing new claims due to plaintiff's failure to post bond was not proper matter for certiorari review; one claim remained viable and pending and there was adequate remedy by appeal after judgment was entered as to that claim.

FELDMAN v. GLUCROFT
CITE as 553 So.2d 282 (Fla.App 3 Dist. 1989)

Mark H. Feldman, in pro. per.

This court certified the question and the supreme court, in Feldman v. Glucroft, 522 So.2d 798 (Fla.1988), held that a defamation claim arising under that statute is not totally abolished since a plaintiff may proceed with such an action if he or she can establish extrinsic evidence of malice or fraud. Based upon that holding, the supreme court vacated the summary judgment issued in favor of the committee members and permitted Feldman to amend his complaint to allege extrinsic malice or fraud.

Thereafter, through an amended complaint, Feldman added new causes of action and new defendants to his claim. In response, the trial court required a bond to be posted by the plaintiff as to the new counts alleged. See 395.0115(5); 768.40(6), Fla.Stat. (1987). When this bond was not posted, the trial court dismissed these new counts. Plaintiff petitions this court for certiorari review claiming, in part, that because the cause of action accrued before enactment of the statutory bond requirement, that statute cannot be retroactively applied to his cause regardless of the new defendants and the new claims made. See Young v. Altenhaus, 472 So.2d 1152 (Fla.1985).

FELDMAN v. GLUCROFT
CITE as 553 So.2d 282 (Fla.App 3 Dist. 1989)

1,2 Because we deny the petition on jurisdictional grounds, we cannot reach the merits of petitioner's argument. Keehn v. Joseph C. Mackey & Co., 420 So.2d 398 (Fla. 4th DCA 1982). A district court is not authorized to review an order partially settling pleadings by way of plenary appeal unless the motion to dismiss or strike is granted with respect to a separate and distinct controversy. Mendez v. West Flagler Family Ass'n, 308 So.2d 1 (Fla.1974). In the case at hand, the claims dismissed did not represent distinct controversies and therefore must await disposition of the entire controversy.

The orders of dismissal, sought to be reviewed, do not affect Court III (defamation claim) and that cause of action remains pending in the trial court for disposition.

3-5 Neither may the district courts entertain a petition for a writ of common law certiorari to review an order partially settling a pleading--as is the situation in the present case. Even if petitioner is correct in contending that error occurred, there is an obvious, adequate remedy by appeal after judgment is entered on Count III, the remaining viable count of petitioner's complaint.

FELDMAN v. GLUCROFT
CITE as 553 So.2d 282 (Fla.App 3 Dist. 1989)

A petitioner for common law certiorari must demonstrate both a departure from the essential requirements of law and the lack of an adequate remedy by appeal after judgment. See Harte v. Palm Beach Biltmore Condominium Ass'n, Inc., 436 So.2d 444 (Fla. 4th DCA 1983); Chalfonte Dev. Corp. v. Beaudoin, 370 So.2d 58 (Fla. 4th DCA 1979). The order in question is not a permitted interlocutory appeal and is not a proper matter for certiorari.

Accordingly, certiorari is denied on jurisdictional grounds and the matter shall proceed below.

APPENDIX G

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 84-8615 CA 19

Florida Bar No. 341010

DR. MARK FELDMAN, PRO SE,
Plaintiff

vs.

STEPHEN GLUCROFT, et al.,
Defendants

Wednesday, August 8, 1990

VIDEOTAPED pretrial examination of DR. HAROLD D. SCHOENHAUS, taken pursuant to notice at the office of DR. HAROLD D. SCHOENHAUS, 7915 Frankford Avenue, Philadelphia, PA. 19136, commencing at about 2:15 p.m., before AARON BERKOWITZ, RPR-CM.

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Q. Dr. Schoenhaus, you mentioned a chapter in a book on rear foot surgery utilizing a selastic plug.

Which text is that, sir?

A. In a text by Mercado, M-E-R-C-A-D-O, titled "An Atlas of Foot Surgery," Volume 2, rear foot surgery, the particular procedure which I've been utilizing since the early Seventies, which is selastic implants in the foot to control flat foot conditions, there is a -- an area which has been designated "The Schoenhaus Plug," which is part of the chapter on flat foot surgery.

Q. Firstly, if you would explain to the jury, utilizing the model, what the subtalar joint arthroereisis is?

A. The subtalar joint is a major joint in the back part of the foot which is comprised of two bones; the heel bone and the bone that sits above it, which is called the talus, which is actually one of the bones of the ankle. The joint connecting these two bones are referred to as the subtalar joint.

In patients who have severe flat feet, often referred to as uncontrollable hypermobile flat foot, we find a sliding of one bone on the other, obliterating and eliminating a canal which sits between the two bones.

It has been found that by blocking the canal with the placement of selastic, such as what we see here, into the canal, will physically block or prevent the top bone from sliding down on the bottom bone. By preventing the top bone from sliding down, we support or hold up the arch of the foot.

Q. Dr. Schoenhaus, have you perform that procedure?

A. I have performed that procedure at least 3 to 400 times, could be as high as 500.

Q. And starting when, sir?

A. I began performing the procedure in 1971, or '72.

Q. You can now answer the question, and that question is, was that an unproven experimental procedure in 1976 or '77?

A. No, it was not.

Q. And on what basis do you make the -- and on what basis do you have for your opinion that that procedure was not unproven experimental in 1976?

A. The use of a procedure which would block the motion between two bones had been developed many, many years before the 70's. 1950's for example, Grice-Green talked about the use of bone placed within this canal to actually block the motion.

LeLievre, in an article written in 19, I believe, 70, talks about the procedure that he had been performing for approximately 11 years utilizing bone to block the motion. So the concept of blocking motion between these two bones had been easily established many years before.

The use of selastic as a material had also been employed in the foot in various locations such as the big toe joint for joint replacement procedures, and had it been determined that selastic was a material that the body did not react to, and more

importantly, selastic is a material that will not create a fusion between these two bones.

One of the problems in using bone to block motion between two other bones is the risk of a fusion of the entire unit, thereby eliminating motion.

Selastic being an inert substance, was very adaptable for use within the canal of the sinus tarsi, which that canal is called, to block the motion, and in the 1970's, in the beginning, 1971, the use of selastic in that canal had begun to have been used. A number of podiatric surgeons throughout the United States, in various locations, had used selastic as a material, either carving it from a block, using a section of a penile implant cut to the appropriate size, or even taking the stem from the total -- from the implant of the big toe joint and placing it in that canal to block motion.

So the foundation of using this procedure had been well established by that time and the results had been well evaluated to determine that this was an excellent procedure in the

control of flat foot.

Q. Doctor, I show you an article by Gene LeLievre, M.D. published in Clinical Orthopaedics and Related Research in 1970, and ask you if this is the doctor in the article that you referred to.

A. Yes, this is the article.

Q. Did Dr. Feldman tell you what -- what sort of thing he was looking for you to say?

A. We discussed the fact that a procedure that had been performed for a good number of years was taken away from him -- excuse me -- and quite frankly, I was somewhat alarmed, concerned, maybe even outraged, that the process that has been done and the removal of the type of procedure by a podiatric surgeon had taken place.

Furthermore, that fact that a decision had

been made that an orthopaedic surgeon could perform that procedure using selastic, but not a podiatric surgeon, was even more irritating, because it seemed at that point now, we're talking not necessarily that the procedure itself was in question, but the fact that a podiatric surgeon was performing that procedure.

Q. Did that bother you?

A. Absolutely.

Q. Why?

A. A three-year trained podiatric surgeon is probably the most highly trained surgeon of the foot in this country.

Utilizing a procedure that I personally had performed for approximately four to five years prior to that time, understanding and evaluating the effectiveness of it, even to the extent that this procedure is one of the most recognized today in the podiatric surgical community as an indicated and warranted procedure, which has certainly served the test of time, indicating to me that the amount of information we had accumulated in '76 was

accurate and sufficient enough to have allowed that qualified podiatric surgeon to be able to perform that procedure, and then to have an orthopedist review it, determine that one, it was experimental, but two, they were allowed to perform it but not a podiatric surgeon, is just ludicrous.

APPENDIX H

A COMPENDIUM OF

STATE
PEER
REVIEW
IMMUNITY
LAWS

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Division of Legislative Activities
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Jeffery M. Stokols, J. D., Assistant Director
Hilary E. Lewis, J. D.
Nancy K. Bannon, J.D.

FOREWARD

All fifty states and the District of Columbia have enacted peer review statutes which provide immunity, in varying degrees, to those who participate in the medical peer review process. Peer review statutes generally also provide for non-discoverability of the committee's proceedings, findings and records, and the inadmissibility of such as evidence in judicial or administrative proceedings. While the majority of these laws address peer review proceedings with respect to a variety of health care providers, this report focuses on committees which evaluate physician services, behavior and performance.

This Compendium was prepared by Hilary E. Lewis, Legislative Attorney in the AMA Department of State Legislation.

Shirley D. Rivers

SUMMARY

Persons Covered by Immunity: The individuals exempt from liability for good faith actions taken within their statutorily authorized duties usually include members of peer review committees, consultants to, or employees of peer review committees, and persons providing information to such committees.

Types of Committees Covered: The state statutes generally pertain to peer review committees formed by medical societies, as well as to those bodies created by a hospital or medical staff.

Responsibilities of Committees: The various statutory duties of peer view committees, the functions they perform under state law, and the degree to which these activities are subject to the immunities provided are addressed in the statutory provisions. The language varies from state to state.

Non-discoverability and Confidentiality: The proceedings and records of peer review committees typically are confidential and non-discoverable. In the statutes of twenty-two states, an important clarification states that information documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action against a health care provider arising out of the matters which are the subject of evaluation and review by the committee merely because they were presented during proceeding of the peer review committee.

continues

In addition, any person who testifies before such a committee, or who is a member of such committee, may not be prevented from testifying as to matters within his knowledge, but such witness cannot be asked about his testimony before the committee or about opinions formed by him as a result of such proceedings. The following state laws contain this provision: Alaska, Arkansas, Florida, Georgia, Indiana, Kentucky, Massachusetts Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin.

An exception that is present in the peer review non-discoverability provisions of a number of state laws permits a physician to obtain access to peer review materials when challenging the curtailment, suspension, termination or denial of staff privileges. Examples of state statutes which contain this exception are: Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, Oregon, Rhode Island, South Dakota and Washington.

COMPARISON CHARTS - OVERVIEW

All fifty states have enacted peer review statutes which provide immunity, in varying degrees, to those who participate in the peer review process. The following charts focus on several issues addressed by these laws.

The first chart, Persons Covered By Immunity Provisions, reflects an analysis of the laws with respect to persons covered by the immunity provisions. Individuals exempt from liability for good faith actions taken within their statutorily authorized duties include members of peer review committees, consultants to, or employees of peer review committees, and persons providing information to such committees.

The second chart, Entities Whose Committees Are Covered By Immunity provisions, notes that these state statutes pertain to peer review committees formed by medical societies as well as to those bodies created by the hospital or medical staff.

The final chart, Statutory Responsibilities of Peer Review Committees, explores another aspect of the peer review immunity laws. The analysis presented highlights the various statutory duties of peer review committees through a focus on the functions they perform under state law, which activities in turn are subject to the immunities provided.

PERSONS COVERED BY IMMUNITY PROVISIONS

State	Member of Committee	Consultant to, or Employee of Committee	Person Providing Information to Committee
Alabama	X	X	
Alaska	X	X	X
Arizona	X	X	X
Arkansas	X		
California	X	1	
Colorado	X		2
Connecticut	X		X
Delaware	X		X
District of Columbia	X		X
Florida	X	X	3
Georgia	X	X	X
Hawaii	X		
Idaho	X	X	X
Illinois	X	X	
Indiana	X	X	X
Iowa	X	X	X
Kansas	X		
Kentucky	X	X	
Louisiana	X		X
Maine	X		
Maryland	X	X	X
Massachusetts	X	X	X
Michigan			X
Minnesota	X	X	X
Mississippi	X		X
Missouri	X	X	X
Montana	X	X	X
Nebraska	X	X	
Nevada			
New Hampshire	X	X	
New Jersey	X		
New Mexico	X	X	X
New York	X		X
North Carolina	X		
North Dakota	X		4
Ohio	X	X	X
Oklahoma	X		X
Oregon	X		X
Pennsylvania	X	X	X
Rhode Island	X		X
South Carolina	X		
South Dakota	X	X	
Tennessee	X		X
Texas	X		X
Utah	X		X
Vermont	X		
Virginia	X	X	
Washington	X	X	X
West Virginia	X		X
Wisconsin	X	1	
Wyoming	X		

1 - Anyone who participates.
2 - Witness before committee.
3 - Health care provider.
4 - Physician, hospital or institution.

COMMITTEES COVERED BY IMMUNITY PROVISIONS

State	Medical Society	Hospital or Medical Staff
Alabama	X	X
Alaska	X	X
Arizona	X	X
Arkansas	X	
California	X	X
Colorado		X
Connecticut	X	X
Delaware	X	X
District of Columbia	X	X
Florida	X	X
Georgia	X	X
Hawaii	X	X
Idaho	X	X
Illinois	X	X
Indiana	X	X
Iowa	X	X
Kansas	X	X
Kentucky	X	X
Louisiana	X	X
Maine	X	X
Maryland	X	X
Massachusetts	X	X
Michigan	X	X
Minnesota	X	X
Mississippi	X	X
Missouri	X	X
Montana	X	X
Nebraska	X	X
Nevada	X	X
New Hampshire	X	X
New Jersey	X	X
New Mexico	X	X
New York	X	X
North Carolina	X	X
North Dakota	X	X
Ohio	X	X
Oklahoma	X	X
Oregon	X	X
Pennsylvania	X	X
Rhode Island	X	X
South Carolina	X	X
South Dakota	X	X
Tennessee	X	X
Texas	X	X
Utah	X	X
Vermont	X	X
Virginia		X
Washington	X	X
West Virginia	X	X
Wisconsin	X*	X*
Wyoming	X	X

*"All organizations reviewing or evaluating the services of health care providers...." (Wis. Stat. §146.38(2))

STATUTORY RESPONSIBILITIES OF PEER REVIEW COMMITTEES

STATUTORY RESPONSIBILITIES	Alabama	Alaska	Arizona	Arkansas	California	Colorado	Connecticut	Delaware	District of Columbia	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas
To evaluate the discipline of [illegible] of [illegible]	X	X	X	X	X	X	X	X	X	X	X			X	X	X	X
To develop criteria or apply the professional or medical standards of quality that [illegible]																	
To evaluate and improve the quality of health care rendered in the area of medical specialty	X	X	X	X	X	X	X	X	X	X	X	X	X	X			X
To obtain and disseminate statistics and information relative to [illegible] and prevention of diseases, illness and [illegible]																	
To develop and publish guidelines which the users of health care [illegible]	X	X	X				X	X	X	X	X		X	X		X	X
To develop and publish guidelines designed to keep the cost of health care reasonable																	
To review the quality or cost of health care services	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
To act as PSRO or PRO		X															
To review, rule on, or advise on controversies, disputes or questions between insurers, insureds, licensing boards, licensees, providers, patients, Government		X			X												
To perform credential review, or to act on the recommendation of candidates for review or privileges																	
To act on the review of privileges recommended for the purpose of [illegible] health care privileges																	
To review and investigate the conduct of licensees to determine if [illegible] to warrant																	

STATUTORY RESPONSIBILITIES OF PEER REVIEW COMMITTEES (Continued)

STATUTORY RESPONSIBILITIES	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carol.
To evaluate the diagnosis or treatment or performance of other physicians	X			X	X	X	X	X	X	X	X		X	X	X		
To perform utilization review			X	X		X	X		X	X	X			X	X	X	
To define, maintain or apply the professional or medical standards of entity that appointed it					X	X	X		X								
To evaluate and improve the quality of health care rendered in the area or medical institution			X	X	X		X	X	X	X	X		X	X	X	X	
To reduce morbidity or mortality							X			X							
To obtain and disseminate statistics and information relative to treatment and prevention of diseases, illness and disorders						X											
To develop and publish guidelines showing the norms of health care in various or medical institution							X										
To develop and publish guidelines designed to keep the cost of health care in reasonable bounds						X	X										
To review the quality or cost of health care services				X			X										
To act as PSRO or PPI	X	X	X	X	X	X	X	X	X	X	X						
To review, rule on, or advise on controversies, disputes or questions between insurers, insureds, licensing boards, licensees, providers, patients, government							X							X			
To perform credential review, or to act on the recommendation of credential review or private committee for the purpose of addressing issues such as those relative to staff privileges		X															
To review and investigate the conduct of licensees to determine if disciplinary proceedings			X														

STATUTORY RESPONSIBILITIES OF PEER REVIEW COMMITTEES (Continued)

STATUTORY RESPONSIBILITIES	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming
To evaluate the provision of professional services	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
To perform utilization review		X	X	X	X	*	X	X	X	X	X	X	X	X	X	X	X
To develop, maintain or apply the professional or medical standards of care that should be met					X	X	X	X	X	X		X					
To evaluate and improve the quality of health care rendered in the area or medical institution		X			X	X		X	X		X	X	X	X	X	X	
To review mortality or morbidity			X		X			X			X						
To obtain and disseminate statistics and information relative to treatment and prevention of diseases, illness and injuries			X								X						
To develop and publish guidelines showing the norms of health care in the area of medical specialization																	
To develop and publish guidelines designed to keep the cost of health care reasonable/within bounds					X										X		
To review the quality of cost of health care services			X					X	X							X	X
To act as PSRO or PRO			X			X	X	X	X	X	X	X	X	X	X	X	X
To review, rule on, or advise on controversies, disputes or questions between insurers, insureds, licensing boards, licensees, providers, patients, governments					X												
To perform credential review, to act on the recommendation of credential review or grievance committee for the purpose of disciplining, issues such as those related to staff privileges			X	X									X	X			
To review and investigate the conduct of licensees to determine if disciplinary action is warranted	X		X	X						X*					X	X	X

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APPENDIX I

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARK FELDMAN, Pro Se

Plaintiff,

-vs- Case No.: 84-08615 CA 19

STEVEN GLUCROFT, et al,

Defendants.

Deposition of DR. ROBERT RASKIN taken under the provisions of the Michigan Court Rules before Marjorie A. Covey, (CSR 2616), Certified Shorthand Reporter and Notary Public, at Sheraton Hotel, Kalamazoo, Michigan on Friday, July 27, 1990 at 9:00 o'clock a.m. pursuant to Notice.

APPEARANCES:

FOR THE PLAINTIFF:

MR. MARK FELDMAN
899 NW 214 Street,
Suite #101
North Miami, Florida
33169

FOR THE DEFENDANTS:

MS. IRMA REBOSO SOLARES
701 Brickell Avenue
Miami, Florida 33131

FOR FIRST STATE INSURANCE COMPANY:

MR. SAMUEL S. LEWIS
2950 Southwest 27th Avenue
Coconut Grove
Miami, Florida 33131

FOR DR. ROBERT RASKIN:

MR. ROBERT TIMMONS
180 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

VIDEO OPERATOR:

MR. BROCK HOWLAND

O'BRIEN & BAILS
Certified Shorthand Reporters
Kalamazoo - Battle Creek - Jackson - Grand Rapids
1-800-262-4946

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EXHIBITS

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PROCEEDINGS

VIDEO OPERATOR: We're on the record at 9:01 a.m.

DR. ROBERT RASKIN,

called as a witness herein, having been first duly sworn testified upon his oath as follows:

EXAMINATION

BY MR. FELDMAN:

Q. Dr. Raskin, for the benefit of the Jury, would you state your name, please, sir?

A. Robert Benjamin Raskin.

Q. And your occupation?

A. Physician.

Q. Your current professional address?

A. Is 7000 Portage Road, Portage, Michigan, with The Upjohn Company.

Q. And would you give the Jury the benefit of your background, training and experience?

A. Well I received my medical degree in 1960, and following a one-year internship in Miami, Florida, I was general medical officer in the U.S. Navy for 2 years. 1963 to 1966, I took a residency in the department of neurology at Jackson Memorial Hospital, Miami, Florida. And thereafter until 1980 I was in the private practice of neurology in North Miami Beach, Florida.

Q. From what years were you in practice in neurology in North Miami Beach?

A. 1966 to 1980.

Q. And where was your office during those years?

A. 163rd Street. My letter office was at the Parkway Hospital Medical Building.

Q. In the Parkway Medical Plaza?

A. That's correct.

Q. And that's adjacent to Parkway Hospital?

A. Correct.

Q. Have you published any papers in neurology?

A. No. I have not.

Q. And your present position?

A. Clinical research manager, the unit of psychopharmacology with the Upjohn Company.

Q. Would you tell the Jury what that is, what that entails, basically?

A. Well that entails drug development, prior to its being marketed, to assess the drug for its utility in whatever area it might be indicated as well as its safety profile.

Q. And how long have you held this position?

A. For 10 years.

Q. Do you deal only in drugs that deal with neurological diseases, or any disease?

A. Primarily psychiatric illness.

Q. While you were in Miami from 1966 to 1980, what hospital staffs did you have privilege at?

A. At Parkway General Hospital, North Miami General Hospital, North Shore Hospital, Baptist Hospital, Jackson Memorial Hospital, that's about it.

Q. Were you on the teaching faculty at Jackson in any capacity?

A. Yes. I was an instructor in the department of neurology from 1966 to 1968.

Q. When you were in private practice were you solo or did you have a partner?

A. I had no partners, I had 2 younger men I took in with me in an office sharing agreement.

Q. And this was in which building?

A. The Parkway Medical Plaza.

Q. Who were they?

A. Dr. Vaughn Cohan, C-o-h-a-n, and Dr. Barry Cutler, C-u-t-l-e-r.

Q. As I understand it you were on Parkway's staff from 1966 to 1980?

A. Correct.

Q. During those years, what committees were you a member of, if any?

A. Well I clearly remember the audit committee, the executive committee, I know there were others, I can not recall specifically.

Q. I realize this is 1990 and this goes back some distance. Were you ever a member of the board of trustees at Parkway?

A. No.

Q. Were you ever a member of the joint conference committee?

A. No.

Q. The bylaws committee?

A. No.

Q. Credentials and qualifications committee?

A. I was on so many hospital staffs and on so many committees I don't recall if I was on the Parkway committee.

Q. Just, I understand sir, if you just try to the best of your recollection that will be fine. I think I can save you some time by asking you to try to recount what committees you were on at both Parkway and North Miami General. So if you were on, for example, if you were on the audit committee at Parkway, as you recall you were, and you were not on the audit committee at North Miami General, as best you can recollect, please say so. So with that frame work were you ever on the audit committee at North Miami General?

A. I don't recall.

Q. And the executive committee at North Miami General?

A. Yes, I was on that committee.

Q. Were you on the board of trustees at North Miami General?

A. No, sir.

Q. The joint conference committee at North Miami General?

A. No, Sir.

Q. How about the credentials and qualifications at North Miami General?

A. I don't recall.

Q. The bylaws at North Miami General?

A. No.

Q. Any other committee that you can recall?

A. No.

Q. At either hospital?

A. No. sir.

Q. When were you told about -- scratch that question. When was the first time you had contact with me, to the best of your recollection?

A. Person --

MR. TIMMONS: Before you answer, Doctor, if we're talking about outside of any peer review, which of course is privileged and for the record we are asserting that privilege, the doctor may answer. If you had contact which was extrinsic to any committee meeting, the doctor may answer. But if we're getting into the area of contacts between Dr. Raskin, my client, and Dr. Feldman that pertains to the peer review or the committees he was on at Parkway General, then I'll assert the privilege and instruct the doctor not to answer.

MR. FELDMAN: For the record you will please put on the record who you are and who you represent.

MR. TIMMONS: My name is Robert Timmons, I represent Dr. Raskin.

MR. FELDMAN: Dr. Raskin is not a defendant in this lawsuit, so do you represent Dr. Raskin through AMI, or do you represent Dr. Raskin as his personal attorney?

MR. TIMMONS: I represent Dr. Raskin in this deposition, Dr. Feldman. It's unclear to me whose privilege it is, whether it's a shared privilege or not, but to the extent it's Dr. Raskin's privilege, he is asserting it. And the judge will have to decide, I guess.

MR. FELDMAN: We need to certify that. Then I'll repeat the question.

Q. When was the first time in your memory you had contact with me?

MR. TIMMONS: Outside of peer review, Doctor.

A. That would have been a telephone call a few years ago, and I don't recall a year.

Q. Do you recall the content of the conversation?

A. Yes.

Q. Would you tell the Jury what the content of that conversation was?

A. You told me that you were representing yourself in a suit against the, I guess the orthopedists, who attempted to keep you or prevent you from performing a podiatric or orthopedic procedure.

Q. Anything else about that that you can recall?

A. Not the original call, no.

Q. And subsequent to that original call?

A. That would have been last week.

Q. And do you recall the content of that conversation?

A. I do.

Q. Please tell the jury what it was.

A. Well you again reiterated your serving as your attorney in this suit against the orthopedists and the hospital I presume, for keeping you off, or preventing you from performing these surgical procedures.

Q. Do you recall may telling you that the hospital was not a defendant in this case?

A. No, not specifically. I assumed they were.

Q. Do you recall my telling you that you were not a defendant in this case?

A. Yes.

Q. Okay. Do you recall my telling you that the reason I did not sue you or the hospital was that I did not intend to hold the hospital or you or anyone else other than the orthopedic surgeons, responsible for the acts of which I complained in this lawsuit?

A. I remember you telling me that I was not named in the suit. I don't recall the hospital though, I assumed they were.

Q. Has anyone told you that the hospital is a defendant in this lawsuit?

A. I remember seeing AMI in print somewhere, possibly -- no, no, that was the records from the executive committee that I reviewed, no.

Q. Do you recall my telling you that this lawsuit dealt with the orthopedic surgeons having labeled a surgical procedure that I did on a child as experimental?

A. Yes.

Q. And that that was the subject of this lawsuit?

A. That's correct.

Q. And that the procedure in fact, as I have, at least I related to you, was not experimental, but that it was designed by orthopedic surgeons in the 1920's?

A. Yes, sir.

Q. And that the orthopedic surgeons used you as a conduit to remove my privileges to do the procedure, which I in fact had when I did it?

MR. TIMMONS: So the record is clear, Dr. Feldman, you are asking Dr. Raskin to repeat what you told him in a phone conversation a week or 2 ago?

MR. FELDMAN: Yes.

MR. TIMMONS: Okay.

MR. FELDMAN: If he recalls my telling him

these facts on the telephone.

MR. TIMMONS: Okay, fine.

A. If by conduit you mean I was chairman of the committee and it was my responsibility to act on the recommendations of the committee members, then in that sense I was a conduit.

Q. Yes. When is the next time we came in contact together? When is the next time you heard from me, after that second conversation?

A. There was a third call prior to your coming to Kalamazoo, as I recall.

Q. Would you tell the Jury the content of that conversation as you remember it?

A. Well you basically inquired as to the availability of the local motels. I can't recall the specifics of the conversation, other than that.

Q. And you recall offering to pick me up at the airport and, you'll have to say yes for the court reporter.

A. I did.

Q. As opposed to shaking -- and that we could spend about an hour together talking about the lawsuit?

A. That's correct.

Q. And when I arrived in Kalamazoo you did in fact pick me up at the airport?

A. Yes, sir.

Q. And with respect to the hour we were supposed to spend together, do you recall what you told me?

A. Yes. I spoke to Mr. Timmons, who is representing me, who advised me not to speak with you in regards to the deposition.

Q. Do you recall telling me that Mr. Timmons represents AMI, that you got a call from him?

A. That was my understanding at the time.

Q. I'd like to take you back to your time spent at, on the staffs of Parkway General Hospital, during the period from 1974 until the time that you left in 1980. Other than within inside the committee room that you were either on as chairman or served in any capacity, do you ever recall hearing my name?

A. No.

Q. At North Miami General, the same question?

A. Same question -- same answer, rather.

Q. Were you ever called to any committee to appear before any committee at Mt. Sinai Hospital to talk about the procedure that's in question here, or Dr. Feldman?

A. At Mt. Sinai Hospital?

Q. Yes, sir.

A. I have no recall of that.

Q. The same question with respect to North Miami General?

A. I have no recall of that.

Q. With respect to Parkway, did you ever testify before any committee about me other than the committees that you actually served on?

A. No, sir.

Q. Do you know what the initials JCAH stand for?

A. Joint Commission on Accreditation for Hospitals.

Q. And to your knowledge what is that body?

A. This is a body that oversees the way the hospitals are run.

Q. And during the years you were at Parkway and North Miami General and all the hospitals that you were on, did you ever have occasion to read the guidelines for the Joint Commission on Hospital Accreditation?

A. No, sir.

Q. Did you ever read the bylaws of Parkway?

A. Yes, I did.

Q. And I want to show you a document which will be Plaintiff's 1.

MR. FELDMAN: Counsel?

Q. This document is entitled Parkway General Hospital memorandum, to podiatrists applying for staff privileges, date January, 1974, from Philip W Leeber, L-e-e-b-e-r, executive director, subject, addition to staff bylaws and ask you if, pardon me -- it says the following addition to the bylaws, rules and regulations

of the medical staff of Parkway General Hospital was approved at the quarterly staff meeting held on December 18, 1973. And ask you if you've ever seen this document before?

A. I don't remember it.

Q. I'd like to draw your attention to section 4.65-3 that says the scope and extent of surgical procedures and treatments that each podiatrist may perform shall be specifically delineated and granted in the same manner as all other surgical privileges. I'd like you to refer to that for a minute.

I'd like to show you a document entitled North Miami General Hospital, Medical Staff Bylaws, revised February 28, 1974, page 10 of 39, section E.

MR. FELDMAN: Counsel?

MR. TIMMONS: What's the date?

MR. FELDMAN: The date is on the outside. (Plaintiff's Exhibit Number 1 marked.)

Q. And I'd ask you to refer to that, sir. Would you read that to the Jury, please?

A. Privileges granted to licensed podiatrists shall be based on their training, experience and demonstrated competence and judgement. The scope and extent of surgical procedures that each podiatrist may perform shall be specifically delineated and granted in the same

manner as all other surgical privileges. Podiatric surgical procedures undertaken must be under the overall supervision of the chief of surgery. A physician member of the medical staff must be responsible for the care of any medical problem that may be present or which may arise during hospitalization. The podiatrist is responsible for the podiatric care of the patient including the podiatric history and physical examination and all appropriate elements of the patient's records. The podiatrist may write orders within the scope of his license, as limited by the applicable statutes and as consistent with the medical staff regulations. He shall agree to comply with all applicable medical staff bylaws, rules and regulations, at the time of application for clinical privileges. The delineation and granting of clinical privileges for a podiatrist shall be accomplished in a manner consistent with the overall procedure established for the medical staff as detailed in article 5 of the rules of procedure for corrective action as detailed in article 7, and the hearing procedure and appeal mechanism detailed in article 8.

Q. Thank you, sir. Doctor, as you understand it what is the purpose --

MR. LEWIS: Excuse me, I'm going to move to

strike his last reading of some unpredicated publication, I don't know what you gave him there, but ask him to qualify, and he, just to read it into the record, I guess I'll object to the form because it wasn't even a question to begin with.

Q. Doctor, as you understand it, what is the purpose of hospital bylaws?

A. To insure that the physicians on staff are appropriately trained and experienced in those areas in which they hope to perform as physicians.

Q. Are doctors permitted to act outside of the bylaws in what they do within the hospital?

A. What do you mean by act outside of it?

Q. Do the doctors on staff have to follow the rules and regulations of the bylaws?

A. Surely.

Q. And the rules and regulations spell out specifically what they must do?

A. I would only take issue with word specifically. For the most part that's correct.

Q. They are in other words the procedures to be followed, is that a fair assessment?

A. Yes.

Q. Within the hospital?

A. Yes.

MR. LEWIS: Object to the form, leading.

Q. You stated that you were on the medical record and audit committee at Parkway. Do you recall the years?

A. '77, '78, somewhere in there.

Q. As you understand the purpose of that committee, what is it?

A. Well it had a number of various functions, medical records to insure that physicians having responsibility to complete medical records on all admitted patients be done in a timely and accurate fashion. Also looking at credentials submitted to the hospital for candidates to any of the various medical groups in the hospital. Physicians on the hospital staff.

Q. Any other functions, as you know them?

A. I'm sure there were, I don't recall off the top of my head.

Q. Did you ever request -- strike that one. Did there come a time when your committee was asked to review a hospital chart identified as Scott Lillian, a 9 year old child on whom I had performed a surgical procedure?

MR. TIMMONS: The activities and the conduct of that committee are privileged under the Florida statute as construed by the Florida Supreme Court, and I'm instructing Dr. Raskin not to answer that question or any other question regarding the

activities of that committee.

MR. FELDMAN: I can ask him if -- I can not ask him what took place within the 4 walls but I can certainly ask him if the committee reviewed that issue.

MR. TIMMONS: I disagree, Dr. Feldman, and I am concerned about an inadvertent waiver of the privilege. We certainly don't intend to inadvertently waive the privilege. I think it's close enough that I'm going to instruct Dr. Raskin not to answer the question.

MR. FELDMAN: Well I'll give you a blank non-waiver of privilege. Are you still instructing him not to answer that?

MR. TIMMONS: Yes, sir.

MR. FELDMAN: Certify it.

Q. Was the medical record and audit committee empowered to ask individuals to appear before it when any chart on any patient came into question?

A. I believe it was.

Q. Would you expect that the individuals who appeared before that committee would tell the truth?

MR. LEWIS: Object to the form.

A. That calls for a conclusion. I don't know that I'm really --

Q. Does the committee expect people who come before it to tell the truth?

MR. LEWIS: Object to the form. Calls for speculation.

Q. Either they're going to lie or they're going to tell the truth. What was your understanding of the people who came before that committee on any chart?

A. On any charges, some did lie, and some did tell the truth.

Q. How did you find out those people lied?

A. Because I knew the individuals involved, and I know the quality of the medicine that they practiced.

Q. Now, Dr. Raskin, during the, one of the phone conversations that you and I had, did I tell you I would send you some documents that were the subject of this lawsuit.

A. Yes, sir.

Q. And did I do that?

A. You did.

Q. And I want to show you a series of documents and ask you if you recall receiving these documents from me?

MR. FELDMAN: Counsel?

I want you to mark the first page and the page that Dr. Raskin read.
(Conversation held off the record.)

(Plaintiff's Exhibit Number 2 and 3 marked.)

Q. Dr. Raskin, I'd like you to review the document I've just handed you and ask you if those are the documents you recall receiving from me?

A. Yes, they are.

Q. What did you do after you reviewed these documents?

A. You called me again, that's right, you called me again, and we just briefly discussed the records themselves.

Q. Do you recall anything that I asked you specifically?

MR. TIMMONS: If we're trying to back into the privilege here I'm going to assert it. That package of documents which is yet to be marked appear to me to consist of records, minutes, proceedings, and letters pertaining to the committee activities which are absolutely privileged under the statues of the Supreme Court decision, and I'm instructing Dr. Raskin not to answer any questions regarding the contents or nature of those documents whether he's asked a specific affirmative question or asked to, excuse me, to affirm or deny a statement made to him.

MR. FELDMAN: You can object as, you're free to object as we go through them but we are going to go through them.

Q. Do you recall the content of the telephone conversation

you just started to relate?

A. I do.

Q And what was the content of the conversation?

A. We discussed these documents.

Q. And specifically did you, do you recall me asking you whether or not the words on document C-4b, on your stationery, were composed by you?

A. As I recall I told you then that I don't recall if the wording was mine or not, or whether the committee secretary sent this letter out.

Q. I see. Do you not recall telling me that the orthopedists actually composed this as you would not have known the language, as a neurologist?

MR. TIMMONS: Asserting the privilege and instruct the doctor not to answer any more questions along this line.

MR. FELDMAN: Will you certify all these, everything that he is instructed not to answer, I would like certified.

Q. Did Parkway Hospital have your stationery on which to write documents, on which to write letters and send out over your name?

A. Yes. On behalf of committee business they might well have.

Q. And the same is true at North Miami General?

A. That I don't remember.

Q. Okay. In the left-hand column, there is the notation RBR/bsd. I assume RBR is Robert Raskin, and your middle name is?

A. Benjamin, that's correct.

Q. Who is bsd?

A. I don't know.

Q. Okay. Do you recall whether or not bsd was a secretary of yours.

MS. SOLARES: Objection, asked and answered.

A. Yes, I did have a secretary with those initials.

Q. Whose name was?

A. Betty Donnechie, D-o-n-n-e-c-h-i-e.

Q. Any idea where she might be?

A. She moved out of Miami some years back, I don't know where she is.

Q. I refer you to document C-3 -- excuse me, going back to C-4b, do you recall whether or not you actually signed that document?

A. There is no signature --

MR. TIMMONS: Doctor, I am not going to let you answer any more questions about these documents, about the merits or the substance of the documents. I am asserting the privilege on your behalf as your lawyer. If you want me to stay here and do that

I'd be glad to do that, if you want to discharge me, you can discharge me, but if I'm here, I'm going to assert the privilege on your behalf. Is that your desire?

THE WITNESS: Yes.

MR. TIMMONS: Thank you.

Q. Document C-3, a letter from, a letter to a Dr. Jerome Moskowitz from you. The initials at the bottom are JB, do you recall who JB is?

MR. TIMMONS: Same instruction, Doctor.

Q. Doctor, in 1975, did you know what a Silastic implant was?

A. No.

Q. Did you know what it was in 1976?

A. No.

Q. 1977?

A. The exact -- I still don't know what it is. So the years are of no import.

Q. Did you know in 1975 what a penile implant was?

A. I don't know.

Q. Same through '76, '77, '78?

A. When I became aware of what their function was and what they looked like I can't tell you, I don't recall what year.

Q. Okay. I want to, I want you to go if you would, please,

to document A, and have you read that if you would, please. It is a letter written to you from Joel Dennis, chairman of the department of orthopedic surgery. He's writing to you as chairman of the medical audit and record committee.

MR. FELDMAN: Counsel, I assume you'll object.

MR. TIMMONS: Yes, as you know there is a privilege of all the activities and records and proceedings of the audit committee, as a peer committee, and we of course are asserting that privilege as I've already told you.

MR. FELDMAN: I want on the record the fact that these documents were produced to me as the direct order of a federal judge, and that as such they are not privileged.

Q. I want you, if you would please, sir, to go to document C-5. Dr. Raskin, do you know who Dr. Charles Weiss is?

A. No, sir, I don't.

Q. Have you ever in your life outside of a committee talked to him?

A. I have no recollection of him.

Q. Have you ever in your life talked to him at all on any occasion?

A. I don't recall if I did.

Q. I'm going to ask you a series of questions, Dr. Raskin.

I recognize that your counsel has objected, and has instructed you not to answer. Nonetheless for the record, it's important I ask you these questions in the event that the Court, that the Judge on reading this, these questions, orders that you answer these questions.

Document A says that the orthopedic department has gone on record as opposing experimental podiatric type procedures such as the placing of a penile Silastic implant for treatment of flexible valgus flat feet. Does that not indicate that the entire penile implant was placed in the joint of a foot?

MS. SOLARES: Objection, leading.

MR. FELDMAN: Your objection is noted. I know he will not answer any of these questions.

MR. TIMMONS: I guess for the record, so there is no uncertainty here, we do consistently assert the privilege, number 1. And number 2, Dr. Raskin of course is a neurologist, he's not a surgeon, and I don't think he knows the answer to most of them. But in order to save time, as Dr. Feldman goes through to preserve the record and ask the questions, I'm instructing you not to answer them, okay?

THE WITNESS: (Witness indicating.)

Q. Document B, the medical records and audit committee March 3, 1977. Dr. Raskin read the responses received regarding queries sent by the committee regarding an experimental procedure performed by a podiatrist. I would ask you, Dr. Raskin, if you composed the words to that query?

MR. TIMMONS: We assert the privilege.

MR. FELDMAN: In order to speed this up, I recognize that every question will be objected to and he can't answer, and I'll just frame the questions. And then we'll just go through it. I'll give you the blanket privilege -- I won't give you -- I don't agree to the privilege but I recognize you're going to make it, you've already instructed him not to answer, and I'm making a record.

MR. TIMMONS: Fine.

MR. FELDMAN: Okay.

Q. In 8 hospitals polled, name the hospitals, Dr. Raskin, the treatment has not been allowable procedure. Our own orthopedic department has gone on record as opposing the treatment which involves placing of a Silastic implant sub-talar joint bilateral for diagnosis of flexible valgus flat foot. It was recommended that the matter be discussed with the doctor involved.

Dr. Raskin was I ever, did I ever appear before your committee or any committee in which you participated or were chairman dealing with the subject matter of this Silastic implant?

MR. FELDMAN: You'll certify all of these questions?

Q. On document C-1, let's see - strike that, before document C-1. Dr. Raskin, to your knowledge was I ever asked about the procedure or the hearing process to your knowledge, was I ever invited to appear before any committee to your knowledge? Did the orthopedic surgeons represent to you that they had in fact asked me about the procedure when in fact they had not, in effect that the orthopedists who brought this accusation lied to the committee?

Okay. Now we go to document C-1. On the communications section, Dr. Raskin, the executive committee passed the bylaw that Silastic implants such as the one cited should not be allowable procedures by podiatrists in this hospital. Now, Dr. Raskin, did you know that the orthopedist surgeons kept the procedure for themselves?

Did you know that under this bylaw orthopedic surgeons could perform the procedure but podiatrists could not?

Dr. Raskin, if the procedure was experimental, could you explain why orthopedic surgeons were allowed to experiment on children and podiatrists were not?

Dr. Raskin -- Dr. Raskin --

MR. FELDMAN: You may allow him to answer this one.

Q. With respect to your knowledge of Parkway's bylaws, hospital procedure, rules and regulations, if a doctor was found to be performing experimental surgery on children, what is the process by which that doctor, or that charge would be brought through the various committees of the hospital?

MR. TIMMONS: You can answer that question.

A. Someone would have to blow the whistle, notify first of all the surgical committee, go to the chairman of the department of surgery, who in turn would bring this either to the ethics committee or medical audit committee, and medical records and audit committee.

Q. You said the chairman of the department of surgery would bring it to who?

A. Yes.

Q. Bring it to who?

A. The chairman of the department of surgery would then notify either the ethics committee or the medical records audit committee, or executive committee,

depending on what his feelings were at the time.

Q. And isn't or is it fair to say that -- strike that. Were you ever contacted by the department of surgery, the chief of surgery with respect to this procedure?

MR. FELDMAN: Counsel?

MR. TIMMONS: If you're asking him his capacity as a committee member I instruct the doctor not to answer because we assert the privilege.

Q. Were you ever contacted by any orthopedist with respect to this procedure?

MR. TIMMONS: Same response.

Q. Parkway Hospital, neither Parkway nor -- is it fair to say that neither Parkway nor North Miami, since you were on the Parkway -- strike that, let me rephrase the question.

With respect to Parkway, is it fair to say that Parkway Hospital would not allow a surgeon to experiment on children?

MR. FELDMAN: Counsel?

MR. LEWIS: I'm going to object to the form as to what is fair to say. He's not in a position to speak for Parkway.

MR. TIMMONS: I guess my problem with that is the doctor is a neurologist so he does not have the technical training and information and knowledge

about a surgical procedure, so I assume that the only way he'd have a knowledge or belief or understanding would be as a member of that records and audit committee, and anything he obtained through that committee or course is privileged and we assert the privilege. So, Doctor, don't answer.

Q. Doctor, if a neurologist was accused of performing experimental procedures on children, would the hospital suspend his privileges immediately until the matter was resolved?

MS. SOLARES: Object, speculation.

MR. FELDMAN: He can answer. It's not --

MR. TIMMONS: I'm not raising the privilege.

A. It would depend on the circumstances. Each case would have to be handled on its own merits.

Q. So do you envision a circumstance where a neurologist is accused of performing experimental procedures on children, and his privileges not being suspended by the chief of neurology, until the matter was resolved?

A. Again, it depends on the nature of the procedure. If it was a rather benign procedure, one that's not been validated clearly in the minds of other currently practicing neurologists we would probably let him do it until we could be darn sure it was or was not an experimental procedure.

Q. Thank you, Dr. Raskin. Would the neurologist be afforded a hearing before either the chief of neurology or the committees at a hospital to determine whether or not such a procedure was experimental?

MR. LEWIS: I'm just going to object -- go ahead.

MS. SOLARES: Improper predicate and speculation, you haven't established for the record that he would know what the procedure would be. You know, he's been saying I assume, I may.

MR. LEWIS: Then you're also using a hypothetical. I don't know if you're applying it to Parkway Hospital or some other institution.

MR. FELDMAN: We've only been talking about Parkway, that's been established.

MR. LEWIS: I don't know if it's clear in his mind.

Q. To be clear, Dr. Raskin, I'll rephrase the question. With respect to Parkway Hospital as you understood it as a neurologist, would a neurologist accused by anyone of doing experimental, neurological procedures on children, be asked about the procedure?

A. If it came to the attention of one of the committees, any of the committees that I named previously, a letter would generally be sent to the physician, notifying him

of the charges made against him. Notifying him at the same time that he had a privilege of a hearing before this committee to discuss the charges.

Q. And that's normal procedure, is it not?

MR. LEWIS: Object to the form.

A. Based on my not always accurate memory, I would say yes.

Q. With respect to North Miami General Hospital, the same procedures, as you understood them?

A. Speculation again, I don't recall the bylaws, but I would expect they were the same.

Q. Thank you, sir. Do you have any knowledge about whether I was in fact asked by any committee or anyone to discuss this procedure and its rational, its treatment?

MR. FELDMAN: Counsel?

MR. TIMMONS: We're asserting the privilege.

Q. Document C-2, Dr. Raskin. Medical record and audit committee, the recommendation that Silastic implants should not be allowable procedures by podiatrists in the hospitals was discussed and approved.

To your knowledge, Dr. Raskin, would that -- strike that. I want you to assume for the purposes of this question, that I have privileges to perform this procedure at Parkway Hospital on April 11th, 1977, Silastic implants, the recommendation that Silastic implants should not be allowable procedures by

podiatrists in the hospital was discussed and approved. Dr. Raskin, wouldn't that, as of April 11th, 1977, remove my privileges to perform that procedure in Parkway Hospital?

MR. FELDMAN: Counsel?

MR. TIMMONS: Same, we assert the privilege.

Q. Dr. Raskin, at the medical records and audit committee, as well as the other committees that you served on both at North Miami General and at Parkway, is it true that in addition to physicians on those committees, there were other individuals who were non-physicians?

MR. FELDMAN: Counsel?

MR. TIMMONS: Assert the privilege.

Q. With respect to committees that you did not serve on, Dr. Raskin, as best you remember the bylaws, rules and regulations of Parkway and North Miami, do you recall physicians and non-physicians being on various hospital committees?

MR. FELDMAN: Counsel?

MR. TIMMONS: You're asking him a question about his understanding of the bylaws. He may answer if he knows.

A. I'm sorry, would you repeat the question?

Q. Yes. As you understood the bylaws that, and rules and regulations at Parkway and at North Miami General, is it

true that physicians and non-physicians served on various committees, nurses, administrators?

A. Correct.

Q. With respect to the medical records and audit committee, the non-physician members would have heard that I was accused of doing experimental surgery on a child with respect to this procedure?

MR. TIMMONS: We assert the privilege..

MR. LEWIS: Outside the privilege, object to the form, it calls for speculation.

Q. Document C-4. This letter dated February 17th, 1977, on your stationery, Dear Doctor, and the doctor, after the doctor it is blank, at the bottom it says chairman department of surgery, Miami School of Medicine. I'm chairman of the medical records and audit committee of Parkway General Hospital, North Miami Beach, Florida. Dr. Raskin, I've already asked you if you composed this letter to your secretary without any outside input or was this letter composed by the members of the orthopedic department?

MR. TIMMONS: That letter is part and parcel of the operation and workings of the committee and the privilege is asserted.

Q. Dr. Raskin, the committee in an effort to evaluate this procedure sent letters to various hospitals and

individuals around the United States, is that true?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. With respect to the letter of February 17th, the second paragraph, the orthopods question the ethics of performing this experimental or thus far unproven procedure by a podiatrist. Were those your words?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Doctor, in you opinion, if you were chairman of the department of surgery and you received this letter stating that the orthopods question the ethics of performing this experimental or thus far unproven procedure by a podiatrist, how would you have responded?

MR. FELDMAN: Counsel?

MS. SOLARES: I am going to object. It calls for speculation.

MR. TIMMONS: Could you read that back for me?

(Record read.)

MR. TIMMONS: My concern with that question is I think it backs into the committee's activities because I think it was a committee activity, whatever happened I think was with respect to the committee, because of course Dr. Raskin would have nothing to do with the surgical procedure being a

neurologist. So because I'm concerned about inadvertent waiver of that privilege I am going to assert it for the Doctor.

Q. Dr. Raskin, the -- if the committee's function was to ascertain whether or not the procedure was experimental, or unproven, would it matter whether it was performed by a podiatrist or an orthopedist?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. If you prefer, in the second paragraph, your comments will be anonymous. Did you receive a call from the chairman of the department of surgery with respect to this letter?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. With respect to -- or, Dr. Raskin, how many letters were sent in total to various entities around the United States?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. C-4b is to be the Department of Surgery, University of Miami School of Medicine, C-4c is to Rollins Hanlon, M.D., director of American College of Surgeons, I note they are the same letter. Were there any others sent?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. With respect to this procedure, C-4d, as in David, did you get a telephone call from Dr. Hanlon about this procedure?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, were you on the executive committee in 1976 at Parkway?

A. I don't know. I do not recall what my period of serving on that committee was.

Q. Dr. Raskin, did you ever talk with any doctor at North Miami General about me, or North Miami General Hospital?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, were you ever told that 2 of the orthopedic surgeons who are defendants in this lawsuit, witnessed me doing the procedure at Parkway General Hospital?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Were you ever told by one or either of those orthopedic surgeons that during the course of the surgery, they were in the operating room with me a sum total of 5 minutes?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Were you ever told that I offered to explain to them what I was doing and why at the time I was doing the surgery?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, were you ever make aware by anyone that I had in fact privileges at Parkway to do this procedure?

MR. TIMMONS: We assert the privilege.

Q. Do you recall my telling you that I had privileges to do this procedure at Parkway?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Do you recall my telling you that on one or more of the telephone conversations that we had that led us to this trial testimony here today?

MR. FELDMAN: Counsel?

MR. TIMMONS: He can answer.

A. Yes.

Q. And when was that?

A. I don't recall which of the 3 or more phone conversations we had over the past week or 10 days, but one of them.

Q. Dr. Raskin, to your knowledge are orthopedic surgeons at Parkway, during the time you were there, allowed to do experimental surgery on children?

MR. FELDMAN: Counsel?

MS. SOLARES: Object to form.

MR. TIMMONS: We assert the privilege.

Q. Same question, North Miami General.

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, to your knowledge, were neurologists allowed to do experimental surgery -- pardon me, were neurologists allowed to do experimental procedures on children at Parkway during the years that you were at Parkway?

MS. SOLARES: Object to the form.

MR. FELDMAN: Counsel?

MR. TIMMONS: He's asking you as a neurologist, not as a member of any committee.

A. Neurologists don't do surgery of any type.

Q. Excuse me, I clarified that to procedures, not surgery.

A. That were considered experimental?

Q. Yes, sir.

A. The term experimental really out of context has very little meaning. We did things that were not widely accepted, that's done in virtually every specialty and subspecialty. It may take 5, 10 years before a procedure gets validated in the literature.

Q. Thank you, sir. Dr. Raskin, were you ever aware of the Florida law which governs the anatomical limitation of

treatment in the State of Florida by a podiatrist?

MR. TIMMONS: We assert the privilege.

Q. To your knowledge, did you know that podiatrists can do any procedure on a human being from the tibia tubercle to the tip of the toes?

MR. LEWIS: Object to the form.

MR. TIMMONS: You can answer if you know.

A. I have no idea.

Q. With respect to the phone conversations that we had together, and we've talked about at this deposition, do you recall relating to me your impression of what the real reasons behind these accusations against me were?

MR. LEWIS: Object to the form.

MR. TIMMONS: I assert the privilege on behalf of Dr. Raskin.

Q. Do you recall telling me that the real reason was, or your impression was, that I was a threat, an economic threat to the orthopedists, and that was the real reason behind this?

MR. LEWIS: Object to form.

MS. SOLARES: Object to form.

MR. TIMMONS: Assert the privilege.

Q. Do you recall my asking you on what basis you had that impression?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Do you recall you telling me that you had no specific time or place of meeting or words, but that it was your impression that all of the accusations against me came from the orthopedic surgeons because I was an economic threat, just in the series of times you were at Parkway?

MS. SOLARES: Object to the form.

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Doctor, as you understand the bylaws of Parkway, whose responsibility is it to see that the doctor gets the hearing procedures outlined in the bylaws?

MR. FELDMAN: Counsel?

MR. TIMMONS: Dr. Raskin, he's asking you about your knowledge of the bylaws of Parkway back in 1970's.

MR. FELDMAN: During this, this is during the pendency of time he was at Parkway.

MR. TIMMONS: Okay.

A. I have no recall as to what the bylaws stipulated on that account.

Q. Would you have any idea what committee or whose responsibility it is to see that the procedures are followed?

A. It would depend on the specific procedures involved. If

you are talking about procedural matters or --

Q. Yes, sir procedural hearing matters.

A. They would first go to the department that you belonged to. In your case it would be the department of surgery.

Q. And then?

A. Then ultimately to medical records and audit.

Q. And whose responsibility is it to see that those levels of hearings are carried out?

A. I don't know that I know the answer to that. I don't know where the executive committee fits in there.

Q. Thank you. In the documents that we read, you suggested, and I want to get the words exact here. There was one document which came out of your committee that said it is suggested that the procedure be discussed with the doctor, or the case be discussed with the doctor involved. Whose responsibility is it to see that that in fact took place?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. This is -- that question related to the medical records audit committee, March 3, 1977, which is document B in this. Just to be clear for the record, who was responsible to see that that recommendation was carried out?

MR. TIMMONS: We assert the privilege.

Q. Do you know whether or not it was ever done?

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, do you know how soon after I did the procedure on the child, the first hearings were held?

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, did your committee write to any podiatry institutions?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Were any podiatrists consulted about the procedure?

MR. TIMMONS: We assert the privilege.

Q. Doctor, as you understood the bylaws at Parkway, through the credentialing process, did neurologists, did the chief of neurology review the application of a neurologist who was applying for hospital privileges?

MR. TIMMONS: You can answer that.

A. Yes.

continues

Q. And to your knowledge, the chairman of the department of neurology would recommend what specific procedures the neurologist could perform or could not perform?

MR. LEWIS: Object to the form.

MR. FELDMAN: Counsel?

MR. TIMMONS: He can answer.

A. Yes.

Q. Did neurology delineate, as far as you understand it.

did the chief of neurology or the neurology department delineate privileges to the section -- well actually there was no department of neurology, or was there a department of neurology at Parkway?

A. No. It fell under internal medicine.

Q. What other specialties were under internal medicine?

A. Endocrinology, gastroenterology.

Q. Would the chief of neurology delineate privileges to a gastroenterologist?

A. No.

Q. Or to any other specialist outside of his own?

A. No.

Q. Was it your understanding of the Parkway bylaws that orthopedists delineated to orthopedists, and neurologists to neurologists, etcetera?

A. I would have to believe that was the way it was set up.

Q. Were you aware with respect to my application that the orthopedic surgeons attempted to block my -- strike that, let me rephrase the question.

Were you ever aware that I applied to Parkway Hospital for surgical privileges in 1974, on or about '73, '74?

MR. TIMMONS: If you can answer that question outside of any knowledge you obtained in the peer review process, you can answer.

A. No.

Q. Were you aware that the orthopedic surgeons made a, what I would characterize as a vociferous effort to keep me from being granted surgical procedures?

MS. SOLARES: Object to form.

MR. TIMMONS: We assert the privilege.

Q. Were you ever aware that over the objections of the orthopedic surgeons, I was granted privileges by the board of trustees based on my credentials?

MS. SOLARES: Object to form.

MR. TIMMONS: We assert the privilege.

Q. At the committee meetings or at any portion -- strike that, let me rephrase it. During the period of time that you or your committee evaluated this procedure, or the controversy that caused us to be here, were you ever made aware that this was an orthopedic procedure first devised in 1928 by an orthopedic surgeon in France?

MR. TIMMONS: We assert the privilege.

Q. I am going to show you an article and ask you if you have ever seen this or was this ever brought to the attention of the committee?

MR. FELDMAN: Excuse me, I have to give it to the lawyers first. Counsel?

MR. TIMMONS: While we're looking at this can we have a one-minute break?

MR. FELDMAN: You can have a 20-minute break.

VIDEO OPERATOR: We're off the record at 10:19 a.m.

(Whereupon a short recess was held.)

VIDEO OPERATOR: We're on the record at 10:26 a.m.

MR. FELDMAN: Counsel?

Q. I'll show you this article, "Artrorise of the Foot" by a physician whose name I can not pronounce from Lyon, France from the Journal of Bone and Joint Surgery in 1928. I'll tell you there are a few pages missing, but I ask if you have ever seen this before.

MR. FELDMAN: Counsel?

MR. TIMMONS: You can answer.

A. No, I have not seen this before.

Q. Thank you, sir. I wanted to show you an article written by Jean LeLievre, I would assume, M.D., in 1970 from Clinical Orthopedics and Related Research, number 70, May/June, 1970, that I represent to you deals with this procedure and ask you if you have ever seen it?

MR. FELDMAN: Counsel?

Q. Dr. Raskin?

MR. TIMMONS: Other than in peer review, Doctor, you may answer.

A. No.

Q. Dr. Raskin, did the orthopedic surgeons during the pendency of your committees bring any individuals to, other than themselves to testify with respect to this procedure?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. At the hearings were you -- was the committee ever presented with any medical literature with respect to this procedure?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

Q. Dr. Raskin, were you aware that during the time that you were at Parkway, I was the only podiatrist who was permitted to do surgical procedures of any kind in the operating theater at Parkway?

MS. SOLARES: Object to form.

MR. TIMMONS: You may answer, Doctor, outside any knowledge you may have obtained through the statutory peer review proceedings.

A. No.

Q. Dr. Raskin, how did you become aware of the fact that I had performed this procedure?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege based on the broadness of the question.

MR. FELDMAN: Based on what did you say, sir.

MR. TIMMONS: That last question, like many of these questions, are broadly based enough so that it could include information Dr. Raskin received outside and inside peer review, and unless the question is more narrowly drawn I'm going to assert the privilege because it will be uncertain as to how he got the information.

Q. Dr. Raskin, were you ever told that I had done this procedure, outside of your meetings in any of the committees that you were on?

MR. FELDMAN: Counsel?

MR. TIMMONS: If you have knowledge of it outside -- we assert the privilege, he is a neurologist, he'd only know as a member of the committee, we assert the privilege.

MR. FELDMAN: Well that's your speculation that he would only know as a neurologist. Had he been told by anyone outside of that hearing room that I had done this operation.

MR. TIMMONS: Well, I guess Judge Turner is going to have to decide alot of these -- is it Judge Turner?

MR. LEWIS: Yes.

MR. TIMMONS: Is going to have to decide alot

of these questions. But my assumption is an orthopedic surgeon or any other surgeon wouldn't be talking to Dr. Raskin as a neurologist about your procedures, he'd be talking to Dr. Raskin about your procedures as a member of a committee and so therefore we're asserting the privilege.

MR. FELDMAN: Well it's nice of you to give him the answers that you'd like him to say --

MR. TIMMONS: I know what his answer is.

MR. FELDMAN: You don't know that that's what is in his head. And I'm asking very simply outside of his function as a committee member was he ever aware that I had done this procedure.

MR. TIMMONS: You can answer that, Doctor, fairly outside of your functions a a committee member. I don't mean just limited in the committee room, but outside of your function as a committee member, if you have any knowledge, you can answer.

A. No, I have no knowledge of that.

Q. When your committee became aware of the fact that I had done this procedure, what did you do?

MR. TIMMONS: We assert the privilege.

Q. Doctor, were you ever told that the actual implant was a one to two-inch portion of Silastic that went into this foot, child's foot.

MR. TIMMONS: We assert the privilege.

Q. Did you give your stationery to the orthopedic surgeons to compose the letters --

--MR. TIMMONS: We assert the privilege.

Q. -- that are the subject of this lawsuit?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

VIDEO OPERATOR: We're off the record at 10:33 a.m.

(Whereupon a short recess was taken.)

VIDEO OPERATOR: We're on the record at 10:34 a.m.

Q. Doctor, I want to pose a hypothetical scenario to you. And then ask you questions based on that hypothetical.

I want to assume that as a neurologist, you were accused of doing an experimental procedure on a child, a procedure to which you had privileges to do, that it in fact was a legitimate neurological procedure. And I want you to further assume that you were accused of doing this experimental procedure on a child and that you were never asked about it, and that your privileges without your knowledge were removed to do it, and that you got no hearings. And that the statements that you had done experimental procedures on a child were spread to other hospitals to which you were applying for

privileges, that you did not get privileges based on this information, that this outrageous lie was sent around the United States about you. I want you to assume that those are, that that is the series of facts that did in fact occur to you. Can you tell this Jury how you would feel about that.

MS. SOLARES: Objection, calls for speculation.

MR. TIMMONS: Doctor, before you answer I am not claiming, asserting the privilege here but let me make something very clear to you. You have taken an oath to tell the truth on the facts and I presume you can be compelled to tell the truth about the facts. But no one an compel you to give opinion testimony or expert testimony unless you so desire. If you desire to give opinion or expert testimony you may do so. If you choose not to, you don't have to and no one can compel you to do so. The choice is yours. It's not a matter of privilege, it's just a matter of no one can force you to give opinion testimony if you don't want to.

A. I'd prefer not to respond to that.

Q. Do you think it would cause you any degree of distress, either emotionally or within your practice life time?

MS. SOLARES: I object.

MR. TIMMONS: Same thing, Doctor. All these

are asking for your opinion which you are free to give or not give as you desire.

A. Yes, the answer is yes to that, it would cause distress.

Q. Would you be angry about having been labeled like that?

MR. LEWIS: Object to the form.

MS. SOLARES: Object.

MR. LEWIS: Relevancy.

Q. Depending on the circumstances of, I'd have to do an awful lot of investigating in order to satisfy myself that, what the rational for the charges were, and I might be angry depending on what I uncovered.

Q. If it ruined your ability to practice neurology to the level that you had been trained, would you be angry about it?

A. Yes.

MR. LEWIS: Same objection as before.

Q. Could you put a dollar value on your career as a neurologist?

MR. LEWIS: Object to the form.

MS. SOLARES: Object to the form.

A. Given enough time and a calculator I could.

continues

Q. Could you put a dollar value on the value you yourself hold with respect to your reputation?

A. No.

Q. No in the sense that it's an immeasurable amount?

MR. LEWIS: Object to the form.

A. It's not a tangible, material amount.

Q. Could you put a dollar value on the stress that you would have endured as the result of the factual outline that I've given you?

MS. SOLARES: Object to the form.

A. No.

Q. Doctor, I'd like you to assume hypothetically that the following facts are true. One, that I had privileges to do this procedure, two, that I had been trained to do this procedure, three, that after I did the procedure, the orthopedic surgeons labeled it as being experimental surgery on children when in fact it was not, that the orthopedic surgeons disliked me because over there objections, I was granted surgical privileges at Parkway. That the orthopedic surgeons who are the defendants in this case, caused the hearing process to proceed as it did without my knowledge through Parkway. That the fact that I had done this procedure has gone from hospital to hospital in Dade County, and Broward County and all over the United States. That it has in fact prohibited me from getting surgical privileges elsewhere.

Given that fact, given that set of facts to be true, I'd like to ask you whether or not you would think

that you or your committee was used rather than told the truth to with respect to what happened?

MR. TIMMONS: Because the hypothetical asserts matters within the privilege we assert the privilege.

MR. FELDMAN: Okay. I have no further questions.

MR. TIMMONS: I have no questions.

MS. SOLARES: I have no questions.

MR. LEWIS: No questions.

VIDEO OPERATOR: We're off the record at 10:42 a.m., end of deposition.

(Whereupon a short recess was held.)

VIDEO OPERATOR: We're on the record at 10:43 a.m., continuation of the deposition.

Q. (by Mr. Feldman) Dr. Raskin, I'm going to show you a portion of the, of testimony given by defendant Dr. Drucker in Federal Case 79-758, this is at page 2565. And I'm referring to lines 22 through 25. Doctor, would you read lines 22-25?

MR. TIMMONS: To yourself, Doctor.

Q. Doctor, did Dr. Drucker ever tell you that he had, or that either Dr. Drucker nor any orthopedists had ever asked me anything about this hearing or these accusations with respect to this procedure?

MR. TIMMONS: We assert the privilege.

Q. Did, according to Dr. Drucker's testimony, no one asked me -- excuse me, according to Dr. Drucker's testimony, at line 22, well question, when being questioned by me, well to your knowledge, did anyone contact me or ask me anything about it. Answer, specifically, no. We did not ask you anything about it.

Did you ever, Dr. Raskin, did you ever know that Dr. Drucker had in fact said that?

MR. FELDMAN: Counsel?

MR. TIMMONS: We assert the privilege.

MR. FELDMAN: No more questions.

VIDEO OPERATOR: We're off the record at 10:47 a.m.

MR. FELDMAN: We went back, we went off the record and then we went back on the record so that the end, the first ending of the deposition was not correct, the second ending is.

VIDEO OPERATOR: End of deposition.

(Deposition concluded.)

(Whereupon after the conclusion of the proceedings, Deposition Exhibits 4 thru 16 were marked at the request of Mr. Feldman.)

CERTIFICATE

State of Michigan)
) ss
County of Barry)

I, Marjorie A. Covey, CSR 2616, Notary Public in and for Barry County, Michigan, do hereby certify that the foregoing deposition of Dr. Robert Raskin was taken before me at the time and place hereinbefore set forth, and that said witness was duly sworn by me to tell the truth and nothing but the truth, and thereupon was examined and testified as in the foregoing deposition appears;

That this deposition was taken in shorthand and thereafter transcribed by me, and that it is a true and correct transcript of my original shorthand notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of July, 1990.

_____
Notary Public in and for
Barry County, Michigan

My Commission expires October 17, 1990.

NO. 91-1278

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE,

Petitioner,

vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A., MELVYN DRUCKER, M.D., MELVYN DRUCKER M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dan Paul,
Counsel of Record

JORDEN SCHULTE & BURCHETTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

Counsel for Respondents,
Stephen Glucroft, et al.

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(a) TO REVIEW A STATE COURT JUDGMENT BASED SOLELY ON INDEPENDENT STATE LAW GROUNDS WHEN THE STATE COURT DID NOT RULE UPON ANY FEDERAL QUESTIONS OF LAW OR DRAW INTO QUESTION THE VALIDITY OF ANY STATE STATUTE ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION OR LAWS OF THE UNITED STATES

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STATEMENT OF THE CASE

Petitioner Mark Feldman's ("Feldman") petition for writ of certiorari mischaracterizes the proceedings and the evidence presented below. Therefore, Respondents Stephen Glucroft, M.D., Joel Dennis, M.D., Lloyd Moriber, M.D., Melvyn Drucker, M.D., Kenneth Hodor, M.D., Robert Ennis, M.D., Hugh Unger, M.D., and Orthopedic Associates, P.A. ("Respondents")[1] provide this Statement of the Case.

A brief summary of the protracted history of this case is necessary for the Court's understanding of why it has no jurisdiction to grant a writ of certiorari. This case involves Feldman's failure in the Florida state trial court, on remand from the Supreme Court of Florida, *Feldman v. Glucroft,* 522 So.2d 798 (Fla. 1988) ["*Feldman II*"], to allege and offer any "extrinsic evidence of malice or fraud" sufficient to overcome the Florida qualified statutory privilege for medical review committee proceedings and records afforded by Section 768.40(4), Florida Statutes (1983). *Feldman v. Glucroft,* 580 So.2d 866 (Fla. 3d DCA 1991) ["*Feldman III*"].

Feldman filed his initial complaint in this action on March 8, 1984. A summary judgment was entered against Feldman on May 7, 1985, pursuant to Florida Rule of Civil Procedure ("Fla.R.Civ.P.") 1.510. Feldman appealed that summary judgment to the Third District Court of Appeal of Florida, which affirmed, *Feldman v. Glucroft,* 488 So.2d 574 (Fla. 3d DCA 1986) ["*Feldman I*"], but certified two questions to the Supreme Court of Florida: "(1) Does section 768.40(4) totally abolish a defamation claim arising in proceedings before medical review

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[1] Feldman named the professional associations of the various respondents (included once again in his style of this case) as parties to the Second Amended Complaint, but failed to serve them with process. They were dismissed from the action by the Circuit Court, and are not proper parties hereto.

committees?" and "(2) If so, is section 768.40(4) invalid as in conflict with Article I, section 21, Florida Constitution?" *Id.* at 575. The Supreme Court of Florida considered the certified questions, and held that Section 768.40 did not completely abolish a defamation claim arising out of a medical peer review proceeding,[2] and accordingly, did not violate the "access to courts" provision of the Florida Constitution, Art. I, § 21. The Supreme Court of Florida did not address any federal issues. The Supreme Court of Florida remanded the case for the sole purpose of permitting Feldman an opportunity to allege and prove extrinsic evidence of malice or fraud sufficient to overcome the Florida qualified privilege set forth in the statute. *Feldman II*, at 801.

On October 8, 1988, purporting to act pursuant to the mandate of the Supreme Court of Florida, Feldman filed a Second Amended Complaint. (Petitioner's Appendix E). This Second Amended Complaint failed to allege extrinsic evidence of malice or fraud sufficient to overcome the statutory privilege. Respondents thereafter filed a motion for final summary judgment. After hearing, the Circuit Court entered final judgment for Respondents, finding that Feldman had "put forth only the privileged matters from the peer review committee proceedings" and in any case the claim was barred by the applicable Florida statute of limitations, Section 95.11(3)(o), Florida Statutes (1983).

On appeal, the Third District Court of Appeal of Florida affirmed the Circuit Court's summary final judgment on the grounds that Feldman failed to come forward with extrinsic evidence of malice or fraud sufficient to overcome the Florida statutory privilege. *Feldman III*, 580 So.2d at 867. Feldman then filed a Motion for Rehearing which was denied. On November 5,

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[2] "We find the 1983 statute, rather than totally abolishing the cause of action, adds an additional restriction to this cause of action." *Feldman II*, 522 So.2d at 799.

1991, the Supreme Court of Florida declined to accept jurisdiction of the case and denied Feldman's petition for review.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to grant a writ of certiorari because the state court did not consider or rule upon any federal law questions. The Third District Court of Appeal of Florida affirmed the summary judgment entered against Petitioner by the state circuit court solely on state law grounds. Because no federal claim was preserved or considered below, Petitioner has no basis for seeking certiorari in this case.

The decision of the Third District Court of Appeal of Florida was based on adequate, independent state law grounds.

ARGUMENT

I. THE COURT HAS NO JURISDICTION OVER THIS CASE BECAUSE NO FEDERAL CONSTITUTIONAL ISSUES WERE RULED UPON BY THE STATE COURT BELOW

The question presented to this Court by Petitioner is whether the Fourteenth Amendment of the United States Constitution permits a state to grant a qualified tort immunity to hospital peer review proceedings. In presenting this query to the Court, Petitioner raises, for the first time on appeal, a denial of due process claim based on the Fourteenth Amendment to the United States Constitution.[3] This Court has no jurisdiction to consider this case as that issue was not addressed below and did not serve as the

[3] Petitioner has previously asserted constitutional claims based upon Article I, Section 9 of the Florida Constitution, which the Third District Court of Appeal of Florida previously found had been "abandoned" or were "totally unconvincing." *Feldman I*, 488 So.2d at 574-75 nn.1-2. Feldman did not preserve either the due process or the equal protection claims in his appeal in *Feldman II*.

basis for the decision of the Third District Court of Appeal of Florida.[4]

This Court has repeatedly held that it will not decide federal constitutional issues that were not raised, preserved or ruled upon in the state court proceedings below. *Webb v. Webb,* 451 U.S. 493, 498-99 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). Petitioner's brief on appeal to the Third District Court of Appeal of Florida made no meaningful argument that his Fourteenth Amendment due process rights were violated by virtue of the lower court's interpretation and application of the qualified tort immunity statute, Fla. Stat. §768.40(4) (1983). In the state court proceedings, Petitioner's arguments with regard to deprivations of due process were based on state law provisions, Fla. Stat. §768.40(4), hospital bylaws, and the Florida Constitution. Petitioner's objection to a state supreme court's application of a state law does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon,* 447 U.S. 255, 259-60 n.6 (1980).

Petitioner made only a passing reference to the equal protection clause of the United States Constitution in his brief to the Third District Court of Appeal of Florida, and did not specifically mention the Fourteenth Amendment:

> Upholding these statutes [395.0115(5) and 768.40(6)] offends Article I section 9, Due Process, Article I section 21, Access to the Courts, and the Equal Protection clause of the Florida and United States Constitutions.

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[4] Feldman appeals from the decision of the Supreme Court of Florida. However, in instances such as this where the supreme court of a state denies review of the decision, the lower court rendering the decision, in this case the Third District Court of Appeal of Florida, becomes the highest court of the state for purposes of this Court's jurisdiction pursuant to 28 U.S.C. 1257(a). See *Randall v. Board of Comm'rs.,* 261 U.S. 252, 252-53 (1923); *Cuyahoga River Power Co. v. Northern Realty Co.,* 244 U.S. 300, 302 (1916).

(Appellant's Initial Brief on Appeal, p. 20). The referenced statutory provisions regulate the posting of a bond in connection with an action brought under the peer review immunity statutes, and were not discussed in the context of whether the application of Section 768.40(4), constituted a due process violation under the Fourteenth Amendment.

In *Webb v. Webb,* 451 U.S. 493 (1981), Petitioner sought certiorari by attempting to raise a federal claim under the Full Faith and Credit Clause, Art. IV, § 1 of the United States Constitution, which she had never raised or preserved in the state courts. *Id.* at 496. Petitioner's assertion that a federal claim had been properly raised below was not refuted by the respondent in his brief in opposition to certiorari. When it became clear to the Court, however, that the federal question had not been raised below, the Court dismissed the petition, and explained:

> Although Petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution.
>
> * * *
>
> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897). Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. . . We are unpersuaded. In fact, we find it far more likely that Petitioner was referring to state law.

451 U.S. at 496-97.

Petitioner here, having failed to bring before the Court below for decision a claim grounded upon the Fourteenth Amendment, cannot now bring this federal provision to the forefront as the primary consideration for this Court. No federal claim was adequately presented in the state proceedings, nor was one the basis of the lower courts' rulings.

In *Cardinale v. Louisiana,* 394 U.S. 437 (1969), the Court stated that

> the Judiciary Act of 1789 . . . vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If *both* of these do not appear on the record, the appellate jurisdiction fails. . . The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . (citations omitted).

394 U.S. 438. (emphasis added).

The opinion of the Third District Court of Appeal of Florida in *Feldman III* does not pass upon any federal due process claim, but rather upholds the decision of the trial court based solely upon the propriety of the summary judgment entered pursuant to Florida Rule of Civil Procedure 1.510:

> Feldman failed to allege the existence of the requisite extrinsic evidence to overcome the statutory privilege afforded defendants. § 768.40, Fla. Stat. (1983). The documents attached to the amended complaint were either privileged committee documents or did not demonstrate malice or fraud. Defendants were therefore entitled to judgment as a matter of law.

580 So.2d at 867.

No federal claim was preserved or ruled upon below, either expressly or by clear implication. This "omission was due to want of proper presentation in the state courts," and the petition for

writ of certiorari should therefore be denied. *Webb*, 451 U.S. at 495.

II. THE DECISION BELOW WAS BASED SOLELY ON INDEPENDENT STATE LAW GROUNDS

Feldman's petition does not present a federal due process issue. Rather, Petitioner in effect asks this Court to review the state court's interpretation and application of Florida law and the Florida Rules of Civil Procedure. That request is not a proper basis for certiorari review by this Court. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).

Petitioner's claim that he has been denied access to the courts and due process of law by virtue of Fla. Stat. § 768.40(4) (1983) is purely a question of Florida state law and procedure. In *Feldman v. Glucroft,* 522 So.2d 798, 799 (1988), the Supreme Court of Florida held that § 768.40(4) did not totally abolish a defamation claim based upon proceedings before medical review committees. The Court vacated the prior summary judgment entered against Feldman and remanded to allow Feldman an opportunity to file an amended complaint "to allege extrinsic malice or fraud." *Id.* at 801.

The *Feldman II* Court reasoned that the Legislature of the State of Florida "had a clear public need and justifiable basis for creating this limited restriction in the area of health care." *Id.* at 800, citing to *Holly v. Auld,* 450 So.2d 217, 219-20 (Fla. 1984):

> Inevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful, or even essential, to their causes. We must assume that the legislature balanced this potential detriment against the potential for health care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight.

522 So.2d at 800-01.

The Third District Court of Appeal of Florida looked to the *Feldman II* opinion for guidance and held that summary judgment had been properly entered. The decision of this court was founded solely upon independent state law principles, Petitioner's failure to "allege the existence of the requisite evidence to overcome the statutory privilege" afforded Respondents by Fla. Stat., § 768.40 (1983). *Feldman III,* 580 So.2d at 867.

Where it is clear that the state court decision was based on bona fide separate, adequate and independent state grounds, this Court should not undertake to review the decision. *Jankovich v. Indiana Toll Road Comm'n.,* 379 U.S. 487 (1965). Even if the state court judgment had rested on both federal and state court grounds, this Court does not have jurisdiction if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Coleman v. Thomson,* __ U.S. __, 111 S.Ct. 2546 (1991). This rule applies regardless of whether the state law is substantive or procedural. *Id.* at 2554. *Accord Henry v. State of Mississippi,* 379 U.S. 443, 446 (1965). In his petition for writ of certiorari, Petitioner has failed to demonstrate that the decision of the state court was based on anything other than an adequate and independent state court ground.

CONCLUSION

For the foregoing reasons, Feldman's petition for writ of certiorari to the District Court of Appeal of Florida, Third District, should be denied.

Respectfully submitted,

/s/ DAN PAUL

Dan Paul
Counsel of Record
JORDEN SCHULTE & BURCHETTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

Counsel for Respondents,
Stephen Glucroft, et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of March, 1992 to: Mark Feldman, 15529 Bull Run Road, Miami Lakes, Florida 33014

/s/ DAN PAUL

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

NO. 91-1278

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

DR. MARK FELDMAN, PRO SE

PETITIONER

VS.

STEPHEN GLUCROFT, M.D., ET AL.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

DR. MARK FELDMAN, PRO SE
15529 Bull Run Road
Miami Lakes, Fla. 33014
(305) 557-8600

QUESTION PRESENTED

PETITIONER'S REPLY BRIEF ASSERTS THAT THIS COURT HAS JURISDICTION IN THIS CASE, AND THAT THE QUESTION PRESENTED IN HIS PETITION FOR THE WRIT IS CORRECT.

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SUMMARY OF THE ARGUMENT

Respondent's assert in their brief at page 2 "this court lacks jurisdiction to grant a writ of certiorari because the state court did not CONSIDER (emphasis mine) or rule upon any federal law questions." No federal claim was PRESERVED or CONSIDERED (emphasis mine) below, Petitioner has no basis for seeking certiorari in this case."

Petitioner asserts that such is not the case.

ARGUMENT

PETITIONER PRESERVED THE UNITED STATES AND FLORIDA CONSTITUTIONAL DEPRIVATION ISSUES FOR REVIEW

THE STATE COURT DID CONSIDER OR RULE UPON FEDERAL LAW QUESTIONS. THE FEDERAL CLAIMS WERE PRESERVED AND CONSIDERED BELOW.

In Petitioner's initial brief to the Third District Court of Appeal of Florida and filed 8/10/85, reproduced as appendix A, the United States Constitutional issues were raised.

In Petitioner's reply brief to the Third District Court of Appeal filed 11/18/85 the United States Constitutional issues were cited again. Reproduced as appendix B.

From these briefs, the Third District Court of Appeal certified the questions to the Supreme Court of Florida. The United States Constitutional issues were carried to the Supreme Court of Florida in his brief filed 8/12/86. Reproduced as appendix C.

APPENDIX D 3DCA 2/26/91

THIS COURT HAS JURISDICTION

As Mr. Justice Powell and Mr. Justice Brennan said in their concurring opinion Webb v. Webb, 451 U.S. 493 (1981), at 502:

> "...the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. Wood v. Georgia, 450 U.S. 261, 265, n. 5 (1981). See also, Vachon v. New Hampshire, 414 U.S. 478 (1974) (finding plain error in an appeal from a state court)."

And as Mr. Justice Marshall said in his dissent, Webb, supra, at 502, "I share the Court's concerns for comity and for careful pleadings. Nonetheless, I do not believe that either of these concerns justifies the Court's apparent conclusion that a petitioner who fails to cite the exact location of a federal constitutional provision has neglected to raise a claim on that ground." In Wood v. Georgia, 450 U.S.

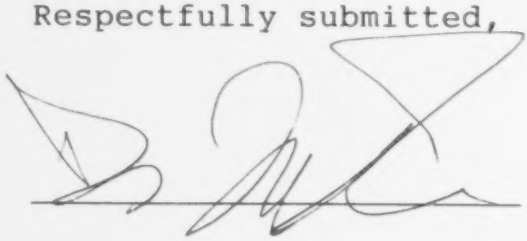
450 U.S. 261 (1981), this court at 264, "Where, as here a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue."

At note 5, "Even if one considers that the conflict-of-interest question was not technically raised below, (emphasis supplied) there is ample support for remand required in the interest of justice. See 28 U.S.C. 2106 (authorizing this Court to "require such further proceedings to be had as may be just under the circumstances"); R. Stern & E. Gressman, Supreme Court Practice 6.27, p. 460 (5th ed. 1978) (in review of state cases, "the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings") (emphasis supplied) See also Vachon v. New Hampshire, 414 U.S. 478 (1974).

CONCLUSION

It is clear that Petitioner asserted his claims under the United States and Florida Constituitions in his complaint upon remand from the Florida Supreme Court. Further, that he preserved such claims from his first visit to both the Third District Court of Appeals and the Florida Supreme Court from which this appeal flows after remand and the filing of the Amended Complaint. This Court has jurisdiction if this Court follows the law asserted in this brief. For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

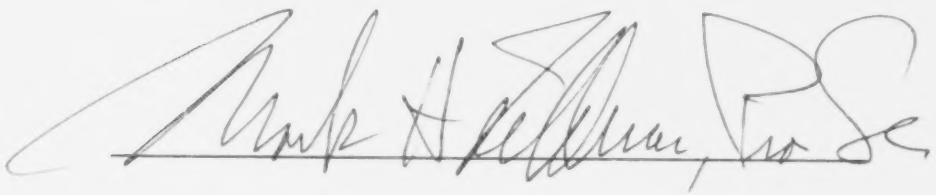


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March 1992 to:

Robert Butterworth, Esq,, Attorney General, State of Florida, Tallahassee, Fla., and

Dan Paul, Esq. Counsel of Record,
Jordan, Schulte & Burchette
701 Brickell Ave., Miami Fla.



A P P E N D I X A

IN THE THIRD DISTRICT COURT OF APPEAL

CASE NO. 85-1262

FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 84-8615

MARK H. FELDMAN, PRO SE

APPLELLANT

VS

STEPHEN GLUCROFT, M.D. et al.

APPELLEES

INITIAL BRIEF OF APPELLANT

MARK H. FELDMAN, PRO SE
1281 N.E. 163rd St.
N. MIAMI BEACH, FLA. 33162
305-947-3333
305-932-0630

From Page 1 and 2

Dr. Feldman alleged that in secret the defendants conspired to and were effective in having his privileges removed to perform this procedure and in the process libeled, slandered, defamed, and denied him his Rights under the United States and Florida Constitutions.

From Page 4

Dr. Mark Feldman, (hereinafter, Feldman) filed his three count Complaint alleging torts of libel, slander and defamation and United States and Florida Constitutional deprivations in March of 1984.(R.1). Defendants answered (R.29) with defenses. Discovery ensued, limited by the Court, with subsequent motions by both sides for Summary Judgment (defendant's R. 40 & 168, by plaintiff R.256). Final Judgment entered on all counts for defendants (R.259) from which plaintiff-appellant appeals (R.257).

Appellant argues that Fla. Stat.768.40(4) is unconstitutional because it violates provisions in the United States and Florida Constitutions. Appellant's position is supported by rulings of the United States and Florida Supreme Courts which have interpeted the constitutional provisions in question to the extent that the statue must fall. The statute fails to pass muster as it removes the constitutionally guaranteed right of access to the courts and grants immunity to medical review committees that in effect is absolute.

"The privilege against discovery is greater than that afforded the press by the first amendment to the United States Constitution, Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115(1979), Holly, supra at 222, fn.2.

"An impartial decision maker is the basic constituent of minimum due process." Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970.

Granting absolute immunity to committee members for tortious conduct would confer upon them the immunity status of the President of the United States and that of Judges. The first amendment does not reach so far. McDonald v. Smith, 105 S.Ct. 2787 (1985). In addition, the Supreme Court has decided that on matters which are not of public concern, recovery of presumed and punitive damages is permitted absent a showing of "actual malice." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985).

> ..."the individuals right to the protection of his own good name..." Builders, supra, at 2945

cannot be abrogated in favor of appellees such as these who did such as appellants allegations in his complaint.

It is an "elementary principle that the same statue may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." Allen v. Louisiana, 103 U.S. 80,83-84, 13 otto 80, 26 L.Ed. 318 (1881), quoted with approval in Field v. Clark, 143 U.S. 649, 695-696, 12 S.Ct. 495, 505-506, 36 L.Ed. 294 (1892).

The subsequent statutes to 395.0356 now mandate reporting to the state infractions relating to patient care when discovered in the review committee process.

This isaction by the state which through multiple choices may discipline or remove a doctors license. Holding the committee records from plaintiffs thus becomes preclusion by the state from obtaining the very proof to clear one's name by activities which might otherwise be private. The Medical Malpractice Reform Act of 1975, et seq mandated reporting to the state. See generally, PRIVATE CONSPIRACIES TO VIOLATE CIVIL RIGHTS, Harvard Law Review, Vol. 90:1721 1977. Staff members who serve on review committees are thus quasi-judicial officers acting for the state to whom its agencies must be reported to by statute.

When, as here alleged, these officers willfully violate the rights of another hospital staff member, they must be called to the Bar of Justice to account for their acts. In this case, Parkway bylaws provided for the hearing process. Defendants willfully circumvented that process for their own gain. The hospital performed as it was required to do, but unknown to them and the plaintiff here, defendants in concert sought to and did destroy another staff member at Parkway and all other hospitals the plaintiff applied to by dissemination of false charges. Such conduct cannot be condoned by allowing defendants to escape by prohibition of proof readily available.

APPENDIX B

IN THE THIRD DISTRICT COURT OF APPEAL

CASE NO. 85-1262

FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 84-8615

MARK H. FELDMAN, PRO SE

APPLELLANT

VS

STEPHEN GLUCROFT, M.D. ET AL.

APPELLEES

REPLY BRIEF OF APPELLANT

MARK H. FELDMAN, D.P.M., PRO SE
1281 N.E. 163rd St.
N. MIAMI BEACH, FLA. 33162
305-947-3333
305-932-0630

"A fair hearing before an unbiased tribunal is essential to due process," Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517 (4Cir. 1974). This Parkway attempted to do until its actions were circumvented by defendants. Even a "private" hospital must follow its bylaws, Margolin v. Morton F. Plant Hospital Assn. 348 So.2d 57 (Fla. 2DCA 1977).

As a matter of law, this court should find that defendants actions were clothed with the mandate of the state and denied Dr. Feldman his rights under the Untied States and Florida Constitutions, if the allegations in his complaint are proved true.

Thus, the privilege statute violates the equal protection guarantees of article 1, section 2 of the Florida Constitution and the Fourteenth Amendment.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

FROM THE THIRD DISTRICT COURT OF APPEAL, OF FLORIDA

CASE NO. 85-1262

DR. MARK H. FELDMAN, PRO SE

PETITIONER,

V. CASE NO. 68,920

3DCA CASE NO. 85-1262

STEPHEN GLUCROFT, M.D. ET AL.

RESPONDENTS.

PETITIONER'S INITIAL BRIEF ON THE MERITS

Dr. Mark H. Feldman, Pro Se
1550 N.E. Miami Gardens Drive
N. Miami Beach, Fla. 33179
305-949-7273, 305-940-2222

SUMMARY OF THE ARGUMENT
From Page viii

This case deals with fundamental rights of doctor's triggered during the process of applying to, being disciplined by, and reviewed in any capacity by one or more hospital committees. The decision by the Court will change the way medicine is practiced in Florida and perhaps the United States. At issue is whether the law as written and applied can withstand constitutional scrutiny as it eliminates, through freezing the discoverability and use in judicial proceedings, all evidence in the hospital committee review process.

The fundamental rights implicated are access to the courts, First Amendment guarantees, and due process and equal protection guarantees under the 14th Amendment of the U.S. Constitution and Article I sections 4, 5 and 21.

As applied the offending statutes grant absolute immunity to all participants in the medical review committee proceedings. The victim is without power to clear his name, and to add insult to injury, plaintiffs must post bond or pay all defendants attorney's fees prior to being heard by a Court. The cause of action for defamation against a doctor is now eliminated by legislative fiat and this Court in it's Holly decision.

The courts of this State and those of the United States have long held that the legislatures and the Congress are without power to eliminate such fundamental rights as are implicated here, without providing an alternative or passing strict judicial scrutiny in explaining the reasons for such elimination.

The case before the Court cannot pass muster for upholding the statutes, eliminating a doctor's cause of action for defamation, and granting absolute immunity to all participants in the defamatory process.

Upholding these constitutional infirmities would precipitate multiple injuries to thousands of health care professionals around the United States.

Hospital privileges would be granted to a select few who "knew the right people," and would eliminate dissent in the health care industry. The Constitutional guarantees of this country cannot be for sale for each group capable of lobbying the legislatures for absolute immunity. The statutes, it is respectfully submitted, must fall.

While giving credence to legislative intent, it cannot be asserted that their power is to eliminate judicial review. Marbury v. Madison, 1 Cranch 137, 163, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). As Chief Justice Marshall insisted,

> "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."

And 32 years later the Chief Justice reinforced the concept in United States v. Nourse, 9 Pet. 8, 28-29, 34 U.S. 8, 28-29, 9 L.Ed. 31 (1835),:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process...leaving to the debtor no remedy, no appeal to the laws

> of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Defendants controlled the orthopedic staffs at other hospitals as well; North Shore and Biscayne, where petitioner would have applied after success at North Miami. Defendants had opposed petitioner at Parkway and lost because of petitioners credentials. Unknown to petitioner, defendants had petitioners privileges reduced at Parkway through the "experimental procedure lie" as alleged in the complaint, and then used the same lie in meetings at North Miami General, where petitioner was applying, all unknown to petitioner. Contrary to Fla. Law, petitioner was not told why his application was rejected at North Miami General.

If these allegations are true, Dr. Feldman was the victim of multiple defamatory acts by defendants circulated to hundreds of persons over several years. The forum for presentation of the truth is a Court of Law, not intra hospital hearings which permit the abolition of a doctors career without recourse. We deal here with

Fundamental Rights, Fla. Const. Art. I, sec. 4, 21, U.S. Const., Amend. 14, Due Process, Equal Protection.

This case involves "judicial enforcement of a discriminating legislative enactment, and therefore state action is implicated. Sasso v. Ram Property Management, 431 So.2d 204 (1DCA 1983), at 211, n. (8).

The statute must be analyzed under the "strict scrutiny"standard because a fundamentalright is involved. Examining Board v. Flores De Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.ed.2d 65 (1976). First amendment rights are included, Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as is the right of access to the courts, e.g. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963). Such rights include those "implicit or explicit" in the Constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1,33-34, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973).

The Statutes as applied allow for the arbitrary and capricious treatment of doctors who apply to hospitals for privileges.

Some are given procedural and substantive due process and some, as petitioner here, are not. The Conflicting statutory provisions and the Holly decision of this court prevent any evidence sufficient for the accused to defend and clear his name. A fair hearing before an unbiased tribunal is essential to due process. Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517, (4th Cir.1974).

"An impartial decision maker is the basic constituent of minimum due process." Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). As the Drucker testimony shows, (R.241-256), the treatment afforded Dr. Feldman was far different from that he would have received had he been an Orthopedist.

Further, this disparate treatment failed to conform to the essential requirements of law. Cardia, supra.3 at 805, through the statutory acceptance of the Rules and Regulations of the Joint Commission on Hospital Accrediation. Defendants actions violated the statute as a matter of law, Cardia, supra, at 806, n. 4, Fla. Adm. Code Rule 10D-28.58(2) (d). (See also n.5 and 6, p.806).

This aberrant procedure which provides a review mechanism where orthopedists are evaluated by orthopedists, as well as other specialists evaluating members of the same specialty, but only in the case of podiatrists not allowing podiatrists to evaluate podiatrists denies both due process and equal protection to petitioner.

Dr. Feldman's liberty and property interest were removed from him contravening the dictates in Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

The effect of Holly, is to grant absolute immunity to the review committees. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985), do not permit such a result.

> "Spreading false information in and of itself carries no first Amendment credentials." 441 U.S. at 171, "It is worth nothing here that the privilege as asserted by respondents would also immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendants participants learned or knew as the result of such collegiate conversations or exchanges.

If damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry?", Id.

> "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstance. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. United States v. Nixon, 418 U.S. 683 (1974). In so holding, we found that although the President has a powerful interest in confidentiality of communications between himself and his advisers, that interest must yield to a demonstrated specific need for evidence. As we stated, in referring to existing limited privileges against disclosure, "(w)hatever their origins, these exceptions to the demand for every man's evidence are not created lightly nor expansively construed, for they are in derogation of the search for truth." Nixon at 710.

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name reflects no more than our basic concept for the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the States...", Dun supra, at 2947 quoting Rosenblatt v. Baer, 383 U.S. 75. 92.

The legislature of Florida is without power to eliminate a cause of action which abrogates petitioner's fundamental rights in this case. Kluger, supra., Holly, supra, dissent of Judge Shaw and Judge Adkins, 221-223.

Hospital officials and all review committees now must be considered "state actors" because their activities are guided by and must be reported to the State.

The state has erected an impenetrable barrier around the "state committees" triggering the protection of Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155. As the Cardia court has noted, at 806, this is impermissible. The statutes are facially unconstitutional.

ADDENDUM TO REPLY BRIEF, ERROR CAUGHT PRIOR TO SENDING BRIEF BUT TOO LATE TO REPRINT BRIEF PRIOR TO THIS CASE GOING TO CONFERENCE

APPENDIX D: APPELLANTS BRIEF SENT TO THE FLORIDA THIRD DISTRICT COURT OF APPEALS FEB. 26, 1991.

ON PAGE 6: Lake Hospital v. Silversmith, 551 So.2d 538(4DCA 1989) at 544, that a physician can claim a violation of due processagainst a private hospital upon the termination of his staff privileges.

From page 7. : ..Lawler v. Eugene Westhoff Mem. Hosp., 497 So.2d 1261 (Fla. 5DCA 1986) the court stated : one of the purposes behind sec. 395.065 was to REQUIRE BOTH PUBLIC AND PRIVATE hospitals to handle staff privileges in conformity with FAIRNESS AND DUE PROCESS."

FROM page 20: Upholding these statutes, (the prohibitions against discovery and the bond requirement for plaintiff's only in hospital peer review litigation), offends

Article I section 9, due process, Article I sec. 21, Access to the courts, and the Equal Protection clause of the Florida and United States Constitutions.

FROM PAGE 21: The Supreme Court of the United States in Bodie v. Connecticut, 401 U.S. 371 (1971), made clear that fee requirements affecting fundamental rights will not stand fundamental evaluation.

This holding must extend to fees which if imposed would render an individual indigent. Boddie rejected distinctions between the civil and criminal process in determining the permissibility of restrictions upon access to the courts. Meltzer v. Lecraw, 402 U.S. 954, n2 and at____v.___406 U.S., nl, Justice Douglas concurring, " I share the view of Justice Black, however that " (T)he decision in Boddie v. Connecticut can safely rest on only one crucial foundation -- that the civil courts of the United States and each of the States belong to

the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney..."

Lindsey v. Normet, 405 U.S. 56 (1972) held invalid a state statute requiring the posting of a double bond. There the state reasoned that frivolous appeals would be halted. In striking the law, the court noted " The claim that the double bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to pay the bond, but also allows meritless appeals by others who can afford the bond." at 78.

FROM PAGE 22: In Martinez v. California, 444 U.S. 227, 281-282 (1980), the Court noted, "a State Court claim is a specis of property protected by the Due Process Clause." THE SUPREME COURT AND LITIGATION ACCESS FEES: THE RIGHT TO PROTECT ONE'S RIGHTS, Duke Law Journal, 73:1153 (part I) and 74: 527 (part II), analyze the Court's cases barring

judicial access fees through fees and bonds.

FROM PAGE 27:

A vested right of action is property and the Legislature may not take it away. 11 AM JUR, Constitutional law, sec. 377. If this court upholds the constitutionality of these statutes, petitioner will have an action under 42 USC 1983 as his profession will be taken away through the mandatory posting of a bond prior to entering the courts. ____v___805 Fed.2d 662 at 662-669.

The government must treat plaintiffs equqlly as access to the courts is a fundamental right. Requiring the posting of a bond by plaintiffs only is disparate treatment by the government and is impermissible. Johnson v, Smith 696 F.2d 1334, (11Cir. 1983).